

LEGAL ISSUES RELATING TO FUTURE STATUS OF GERMANY

HEARING BEFORE THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE ONE HUNDRED FIRST CONGRESS SECOND SESSION

JULY 12, 1990

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LEGAL ISSUES RELATING TO FUTURE STATUS OF GERMANY

THURSDAY, JULY 12, 1990

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 3:10 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell and Kerry.

The CHAIRMAN. The Committee on Foreign Relations will come to order. This afternoon, our committee is conducting a hearing to consider the legal issues relating to the future status of Germany. We will be examining the question of what rights the United States still retains with respect to a reunified Germany, and how, as a legal proposition, such rights should be appropriately disposed of.

We will also be exploring the nature of the legal instrument, or instruments, which should embody all the agreements and understandings concerning the reunified Germany which are now being negotiated and discussed with the Soviets, and with German officials and with our other European friends. We also need to know what the future role of the Senate will be with respect to these postwar arrangements—whether, for example, there should be a treaty or treaties, and will the Senate be called upon to give its advice, as well as its consent to ratification.

For many years it appears to have been the policy of our country to bring about the conclusion of a peace treaty with the unified Germany. We will be asking today whether that is still our policy, and whether, as a matter of international law and constitutional history, that should or should not be our goal.

[The prepared statement of Senator Helms follows:]

PREPARED STATEMENT OF SENATOR HELMS

Mr. Chairman, I can think of few international questions as important as the future status of Germany. I commend you for holding this very timely hearing. We have very fine witnesses who will undoubtedly cast much needed light on this complicated matter.

There has never been a peace treaty with Germany to conclude World War II formally such as was negotiated with Japan in 1952. The reason, of course, has been that a peace settlement had to include a whole Germany and not pieces of a divided Germany.

Now that Germany is being reunified, there are a number of important questions which need to be addressed. For example:

Do we need a formal peace treaty today? Who should be parties to such a treaty?

What is the role of the Senate and the Committee on Foreign Relations in the peace settlement process?

Twice during this century, the peace of Europe and the peace of the world was shattered by German designs to revise the international balance of power. German geopoliticians and generals sought to create a German-controlled zone from the Baltic Sea to the Persian Gulf. From this base they sought to extend German power and influence across Asia and indeed right into the New World. These aggressive designs were, of course, defeated but at great cost in blood and in treasure. Because of World War II, half of Europe fell under Soviet domination.

Because we are entering a new era in Europe we must think carefully about how best to preserve our national interests in a rapidly changing world. We must develop and implement a national strategy which will protect our security and preserve our way of life.

A peaceful, free, and prosperous Europe is no doubt in our interest. A hostile combination of European powers would threaten our national security as it has in the past. So we must do what is in our power to influence the emerging European order in a way which protects our national interests.

The manner in which the German question is resolved will determine the direction of the new European order for decades to come. So, again I commend the chairman for convening this hearing and look forward to the testimony of these fine witnesses.

The CHAIRMAN. Our first witness will be Mr. Michael Young, Deputy Legal Advisor at the State Department. Following his testimony, we will hear from a distinguished panel of experts.

Mr. Young, we welcome you to the committee. We look forward to hearing your presentation.

STATEMENT OF MICHAEL K. YOUNG, DEPUTY LEGAL ADVISOR, DEPARTMENT OF STATE

Mr. YOUNG. Mr. Chairman, thank you. On behalf of the Department of State, I would like to thank the committee for giving us this opportunity to outline the legal aspects of our work on a final settlement on Germany.

From its postwar beginnings to the present day, our German policy has been one of remarkable consistency. In 1946, then Secretary of State Burn said, "While we shall insist that Germany observe the principles of peace, good neighborliness, and humanity, we do not want Germany to become the satellite of any power or powers or to live under a dictatorship, foreign or domestic. The American people hope to see peaceful, democratic Germans become and remain free and independent."

Throughout the intervening 45 years, we have consistently voiced this conviction, constantly reaffirming our support for united, democratic, peaceful Germany, fully sovereign and fully integrated into the community of democratic, peaceful European states. Now, we stand on the threshold of the realization of this goal.

We are currently engaged in a process, along with the United Kingdom, France, the Soviet Union, and the two Germanies, to resolve the legal vestiges from the war prolonged by this conflict. In our view, the ultimate goal of this process, the so-called two-plus-four process, is a united Germany that is fully sovereign and free to determine its own future. When such a goal is realized, we consider it important, as Chancellor Kohl and other German political leaders have made abundantly clear, that a unified Germany will choose to remain firmly anchored in Western institutions.

We must avoid the perpetuation of any discriminatory limits on Germany. Limitations must only be entered into by Germany of its own sovereign will. In the two-plus-four process, the imposition of unilateral restrictions on Germany would fundamentally undermine, perhaps, our most important principle, that of self-determination.

Moreover, as we learn from the catastrophic consequences of the 1918 Versailles Conference, the imposition of punitive and one-sided limitations can be fundamentally destructive of democracy.

I would now like to sketch out the extent of our current legal rights and responsibilities with regard to Berlin and Germany as a whole. These rights are at the heart of the current two-plus-four negotiations between the two Germanies and the four powers on the external aspects of German unification. Thereafter, I will say a few brief words on what we view as the legal and political context within which we are negotiating an end to these rights, and the creation of a fully sovereign, democratic, and united Germany.

From the very beginning of the occupations, the four powers were careful to make clear that, one, that they were not annexing Germany; two, Germany, as a state, would continue to exist under international law; three, that they reserved a voice in Germany's ultimate borders and government.

Despite repeated efforts on the part of the Western allies and the emerging West German Government to merge all four occupation zones and establish a democratic and united German Government, agreement could not be reached with the Soviet Union concerning all German elections, and the terms for a peace treaty with Germany.

Thus, the FRG was founded with the approval of the three Western allies on September 21, 1949. As of May 5, 1955, the Western allies ended the occupation regime in the FRG, reserving their rights with respect to Germany as a whole, a peace settlement, the affirmation of Germany's ultimate boundaries and Berlin.

This was accomplished in the convention on relations between the three powers and the Federal Republic of Germany. Article VII of that convention states that it is the common aim of the three Western powers and the FRG, to achieve by peaceful means, "A united Germany enjoying a liberal, democratic constitution like that of the Federal Republic and integrated within the European community."

West Berlin remains legally occupied by United States, British, and French troops, and greater Berlin remains legally subject to the occupation rights of the four powers. Although the exercise of allied rights does not significantly affect the day-to-day life of Berlin, these rights have been crucial to the survival of the city. It is these rights that have provided the legal basis for the allied presence in, and the protection of the Western sectors of Berlin, and enabled, not only allies, but also Berliners and West Germans unhindered transit, particularly air transit, through Soviet-occupied GDR territory.

One of the issues confronting us in the two-plus-four negotiations is the German borders. Both German parliaments passed last months resolutions confirming the current Oder-Neisse line as the Polish-German border, and foreswearing any future German claims

to territory. In transmitting the text of the resolution, Foreign Minister Genscher informed the Polish Government that the Government of the FRG had adopted the resolution as its policy as well.

The Polish and German Governments have also agreed to negotiate a treaty, binding under international law that will reconfirm treaties the two Germanies already have with Poland, establishing their common border. Thus, we are confident that we will be able to negotiate in the two-plus-four talks a suitable affirmation of Germany's borders.

We are also negotiating the complete termination of all reserved four power rights, leaving a united Germany fully sovereign. We believe that political/military aspects of German unification, such as Germany's membership in NATO and its troop force levels, are issues more properly discussed by a sovereign Germany, and in the four that have been specifically established for such issues, such as the conventional arms talks in Vienna or NATO. We have, nevertheless, agreed to hear Soviet concerns on these issues in the two-plus-four negotiations.

Finally, we are working out in the two-plus-four negotiation, the terms of final settlement that will resolve all outstanding four-power issues regarding Germany in a manner consistent with the goal of a Germany free from any vestiges of the occupation era.

The United States has considerable flexibility regarding the form and contents of the settlement document. Our approach reflects the fact that the central element in resolving the Germany question; namely, the ending of Germany's tragic and artificial division, is coming about as a result of the sea change in Eastern European politics and through the actions and decisions of the Germans themselves. The settlement document is needed, in our view, solely to provide an uncontested basis for full German sovereignty. Thus, we believe that the settlement document should be brief. It must make a few important, but technical adjustments, to make the legal situation in Germany correspond to the new political realities there.

Not all of the participants in the negotiations currently agree with our preferred approach. The Soviets want to use the settlement to create important new obligations and commitments involving Germany. However, if our preferred approach prevails, the German settlement will direct itself to the fulfillment of four-power responsibilities and the termination of four-power rights. To the extent the new situation gives rise to new obligations, these will be undertaken in other documents. For instance, in multilateral agreements, unconventional arms limitations in Europe.

Against this backdrop, Mr. Chairman, let me briefly address some of the general issues regarding the Senate's role on German treaty matters, and survey the criteria that we will look at, together with the views of this Committee and others in Congress in making the final judgment as to the appropriate domestic forum for the settlement.

The Senate has already played a significant role in the adoption of the individual pieces of the conclusion of peace with Germany, with the result that the few remaining matters are generally technical in nature.

First, Congress and the President ended the state of war with Germany on October 24, 1951, when the President issued a proclamation pursuant to a joint resolution of Congress.

Second, the Senate gave its advice and consent on July 13, 1953, to the agreement on German external debts, which resolved reparations and other key issues that would normally have been addressed in a peace treaty.

Third, on July 1, 1952 and again on April 1, 1955, the Senate gave its advice and consent to the convention on relations between the three powers and the Federal Republic of Germany and its related protocol on the termination of the occupied regime in the FRG, which resolved other key issues necessary to normalizing our relationship with West Germany.

Finally, the Senate ratified our treaty of friendship, commerce, and navigation with the FRG, establishing the foundation for our trade relations with that country. The allied rights and other subjects which remain for negotiation as part of the final settlement are set forth and reconfirmed in various executive agreements, not treaties. I am referring to such documents as the August 1, 1945, Potsdam Protocol, the 1945 declaration regarding the defeat of Germany and the assumption of supreme authority, and the 1971 Quadripartite Agreement on Berlin.

I should also note that the desire to avoid a peace treaty is felt very keenly in Bonn. We have been at peace with Germany for 45 years, a peace officially declared by Congress in 1951. During 35 of those years, the West Germans have been our trusted ally, and they have won our confidence and admiration. They have long since ceased to be a vanquished foe, and we do not wish to do anything that makes it appear as if we have approached the final settlement on Germany from opposing sides rather than as the close allies that we are.

The Department of State's regulations on international agreements contained in the Foreign Affairs Manual set forth the general criteria we review in resolving the question of submission to the Senate. The first criterion, and the most important, is the extent to which the settlement will involve commitments or risks affecting the Nation as a whole. As I have noted, we do not intend to enter into new obligations in the settlement document, but merely to solemnize our fulfillment of an old one; namely, our obligation to promote the emergence of a democratic, sovereign, unified Germany within a community of democratic states. The settlement will not create new rights.

The Department's second criterion is whether the settlement is intended to affect state laws. The settlement as we now see it would not.

Third is whether the agreement can be given effect without the enactment of subsequent legislation. No legislation would be required to implement the settlement we currently foresee.

Fourth is past U.S. practice regarding similar agreements. As I have noted, the settlement in all likelihood will address those issues that we have traditionally included in executive agreements.

Fifth, the criteria highlight the preference of the Congress as to the particular type of agreement.

Sixth is the degree of formality of the settlement. It is simply too early to assess this criterion at this stage. I would note, however, that it has been Bonn's strong desire, and also our preference, not to present this settlement as a peace treaty dividing victors and vanquished. This may affect the degree of formality desired.

Seventh, the criteria refer to the proposed duration of the agreement, the need for its prompt conclusion and the desirability of concluding a routine or short-term agreement. The proposed settlement is intended to resolve permanently, the comparatively narrow issues it will probably cover. Once the parties reach agreement, the sheer pace of events in Germany will make it desirable to bring the settlement into force expeditiously.

Finally, the criteria refer to the general international practice as to similar agreements. Some of the other parties may submit it to their parliaments, others may not. However, this is a criterion we must treat with caution because the other states concerned have very different legal systems.

Mr. Chairman, these are the criteria we will weigh in addressing the proper form for U.S. adherence to the eventual settlement document. I cannot say what final conclusion they will support, but I am confident that as the matters become clearer, the Department will remain in close touch with you and your colleagues.

Returning to the two-plus-four agenda in conclusion, I would also like to say a word about why this goal of a united and democratic Germany, free from four-power reserved rights is in the United States interest. These allied rights must be seen and understood within their historical context.

The United States made a firm decision not to impose a punitive peace upon a defeated Germany. We sought guarantees that Germany would not, again, threaten peace on the European continent, and felt that the greatest guarantee would be in the establishment of a free and democratic Germany. The only reason these rights have continued to be of significance 45 years after the war is that the goal of a unified and democratic Germany could not be achieved in the postwar years.

Thus, it would be a mistake, in our judgment, to view these allied rights as rights vis-a-vis the Federal Republic or even the German Democratic Republic. They are rather rights which the Western allies, in close consultation with our West German ally, have preserved and maintained precisely to preserve the freedom of Germans living in the Western sectors of Berlin and to keep open the question of and demonstrate our commitment to a unified and democratic Germany.

Political unity has also progressed rapidly and its formal establishment is only a matter of time. The expansion of a liberal democracy, with a market economy and close ties to the Western alliance, to all of Germany is clearly in the interest of the Western alliance. It is, in fact, a triumph for democracy made possible by that alliance.

We are not engaged in the two-plus-four negotiations regarding the external aspects of unification in order to come to terms with the FRG regarding German unity. We, as well as the British and French, are already in full accord with the FRG regarding the end-point of this process, the establishment of a democratic and united

Germany enjoying full sovereignty and free to choose its own alliances.

We are now making the effort in the two-plus-four negotiations, in coordination with our Western allies, to persuade the Soviet Union that it is also in its interest to support the establishment of a unified, democratic Germany, without future impediments on its sovereignty. We firmly believe it is not in the interest of anyone, including the Soviet Union, to singularize Germany and thereby create the potential for future resentment and instability.

These phrases of peace, freedom, and unity often have a trite ring to them. I think it is a token of the times in which we are privileged to work, however, that there are no others to describe this process, the process that is now taking place on the European continent. Nothing in our view furthers U.S. interest more than contributing to that process.

Mr. Chairman, I appreciate your patience and attention. I would now be delighted to address any questions that you might have.

[The prepared statement of Mr. Young follows:]

PREPARED STATEMENT OF MICHAEL K. YOUNG

On behalf of the Department of State, I would like to thank the committee for giving me this opportunity to outline the legal aspects of our work on a final settlement on Germany.

From its postwar beginnings to the present day, our German policy has been one of remarkable consistency. In 1946, in Stuttgart, Germany, then Secretary of State Byrnes said:

"While we shall insist that Germany observe the principles of peace, good neighborliness, and humanity, we do not want Germany to become the satellite of any power or powers or to live under a dictatorship, foreign or domestic. The American people hope to see peaceful, democratic Germans become and remain free and independent."

[Restatement of U.S. Policy on Germany: Address by Sec. of State Delivered in Stuttgart, Germany, Sept. 6, 1946, Dept. of State Publication 2616. European Series 13: Dept. of State Bulletin, Sept. 15, 1946, pp. 496-501.]

Throughout the intervening 45 years, we have consistently voiced this conviction, constantly reaffirming our support for a unified, democratic, peaceful Germany, fully sovereign and fully integrated into the community of democratic, peaceful European states. Now, we stand on the threshold of the realization of this goal.

The clarity and simplicity of our position in no way diminishes the long and difficult path to its accomplishment. Nor should it detract from the considerable sacrifices made by both the American and German people, as well as others in the Western Alliance, in our joint quest for a prosperous, democratic, united Germany. The division of Germany during more than four decades was the symbol, as well as the most dramatic expression, of the division of Europe into opposing camps. Germany's division was itself—as we experience during crises from the 1948 Berlin blockade to the building of the Berlin wall in 1961—a source of dangerous tension as well. Management and control of the instability and conflict occasioned by this division have required great effort and energy.

We are now engaged in a process—along with the United Kingdom, France, the Soviet Union, and the two Germanys—to resolve the legal vestiges from the war prolonged by this conflict. In our view, the ultimate goal of this process, the so-called two-plus-four process, is a united Germany that is fully sovereign and free to determine its own future. When such a goal is realized, we consider it important—as Chancellor Kohl and other German political leaders have made abundantly clear—that a unified Germany will choose to remain firmly anchored in Western institutions.

A central element in a successful conclusion of these negotiations must be, in our view, a termination of the remaining rights and responsibilities of the four powers allied against Germany during World War II. We must avoid the perpetuation of any discriminatory limits on Germany. Limitations must only be entered into by Germany of its own sovereign will. But in the two-plus-four process, the imposition of unilateral restrictions on Germany would fundamentally undermine perhaps our

most important principle, that of self-determination. Such an imposition would also be inconsistent with our desire to ensure the full sovereignty of the German nation. Moreover, as we learned from the catastrophic consequences of the 1918 Versailles Conference, the imposition of punitive and one-sided limitations can be fundamentally destructive of democracy.

I would now like to sketch out the extent of our current legal rights and responsibilities with regard to Berlin and Germany as a whole. These rights are at the heart of the current two-plus-four negotiations between the two Germanys and the four powers on the external aspects of German unification. Thereafter I will say a few words on what we view as the legal and political context within which we are negotiating an end to these rights and the creation of a fully sovereign, democratic, and united Germany:

In agreements concluded during and immediately after the Second World War, the United States, U.K., and the U.S.S.R. (and later France) agreed that Germany, as part of its unconditional surrender, would be occupied by the four powers. The wartime allies divided Germany into three and, with the addition of France, four zones. The Soviets occupied what is now the GDR, the former British, French, and American zones now comprise the FRG.

The four powers were careful to make clear from the very beginning of the occupation that:

- they were not annexing Germany
- “Germany” as a state would continue to exist under international law
- they reserved a voice in Germany’s ultimate borders and government.

Despite repeated efforts on the part of the Western allies and the emerging West German Government to merge all four occupation zones and establish a democratic and united German Government, agreement could not be reached with the Soviet Union concerning all-German elections and the terms for a peace treaty with Germany. The four powers have long since individually ended the state of war between themselves and Germany.

The FRG was founded with the approval of the three Western allies on September 21, 1949. As of May 5, 1955, the Western allies ended the occupation regime in the FRG, reserving their rights with respect to Germany as a whole, a peace settlement, the setting of Germany’s ultimate boundaries and Berlin. This was accomplished in the “Convention on Relations between the three powers and the Federal Republic of Germany.” Article 7 of the convention states that it is the common aim of the three Western powers and the FRG to achieve by peaceful means “a unified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European Community.” A parallel process took place in the Soviet zone. On October 7, 1949, the Soviets authorized the establishment of the GDR. The Soviet Union formally granted sovereignty to the GDR on March 25, 1954.

As a result of the September 12, 1944, London Protocol, Berlin was divided into three and, with the addition of the French, later four sectors to be jointly governed by the Allied Kommandatura (“AK”), made up of the military commandants of the four powers. Even though the Soviets left the AK on July 1, 1948, the AK remains the supreme authority with respect to all of greater Berlin. But since 1948 the Western allies have been able to exercise their authority through the AK in practice only in the three Western sectors of Berlin.

In 1949 and 1950 the Western Allies precluded the FRG and Berlin authorities, who were drafting their respective constitutions, from making Berlin a state of the FRG. This was necessary in order to preserve Berlin’s occupation status, and thereby allied and West German access to the city. In the “Declaration on Berlin” of May 5, 1955, the three Western allies granted the West Berlin city government substantial authority to govern the internal affairs of the Western sectors of Berlin. The declaration provides that the three powers would normally confine the exercise of their authority to allied security and immunities, disarmament and demilitarization, foreign relations, satisfaction of occupation costs and police matters.

Although Berlin was not formally incorporated into the FRG, the Western sectors of Berlin have been increasingly merged into the legal, economic, and social structure of the FRG. In 1971 the four powers concluded the quadripartite agreement on Berlin, which left the Soviet and Western divergent legal views on Berlin and Germany as a whole untouched, but which largely removed Berlin as a friction point between the superpowers and brought about considerable practical improvements in civilian access, communications, trade, and other areas between West Berlin and the FRG.

West Berlin remains legally occupied by United States, British, and French troops and greater Berlin remains legally subject to the occupation rights of the four

powers. Although the exercise of allied rights does not significantly affect the day-to-day life of Berlin, these rights have been crucial to the survival of the city. It is these rights that have provided the legal basis for the allied presence in, and protection of, Berlin and enabled not only allies, but also Berliners and West Germans, unhindered transit, and particularly air transit, through Soviet-occupied GDR.

In sum, the FRG has been sovereign since 1955 and become one of our closest and most reliable allies and Berlin has been formally self-governed since 1955 and been increasingly incorporated into the FRG. Nevertheless, the Western allies have preserved basic rights regarding Berlin and Germany as a whole, including those rights regarding the affirmation of Germany's final borders and the conclusion of a final settlement. They have done so with consistent Western support in order to underlie the fact that the German question remains open, the division of Germany unacceptable, and the goal of a Germany united in democracy and peace our common objective.

These rights and responsibilities form the framework within which the four powers and two Germanys are meeting to work out the external aspects of German unification. As Secretary Baker noted at the first two-plus-four ministerial meeting, our sole task is to fulfill those responsibilities and to terminate our rights.

One of the issues confronting us in the two-plus-four negotiations is the German borders. Both German parliaments passed last month resolutions confirming the current Oder-Neisse Line as the Polish-German border and forswearing any future German claims to territory. In transmitting the texts of the resolution, Foreign Minister Genscher informed the Polish Government that the Government of the Federal Republic of Germany had adopted the resolution as FRG Government policy as well. The Polish and German Governments have also agreed to negotiate a treaty, binding under international law, that will reconfirm treaties the two Germanys already have with Poland establishing their common border. Thus, we are confident that we will be able to negotiate in the two-plus-four talks a suitable affirmation of Germany's borders.

We are also negotiating the complete termination of all reserved four-power rights, leaving a united Germany fully sovereign. We believe that political-military aspects of German unification, such as Germany's membership in NATO and its troop force levels, are issues more properly discussed by a sovereign Germany and in the forums that have been specifically established for such issues, such as the conventional arms talks in Vienna or NATO. We have nevertheless agreed to hear Soviet concerns on these issues in the two-plus-four negotiations. Finally, we are working out in the two-plus-four negotiations the terms of a final settlement that will resolve all outstanding fourpower issues regarding Germany in a manner consistent with the goal of a Germany free from any vestiges of the occupation era.

The United States has considerable flexibility regarding the form and contents of the settlement document. Our approach reflects the fact that the central element in resolving the German question—the ending of Germany's tragic and artificial division—is coming about as a result of the sea change in Eastern European politics and through the actions and decisions of the Germans themselves. The settlement document is not the instrument that will end Germany's division. Instead, it is a coda, albeit an important one, to the central work being carried on peacefully and democratically by the Germans themselves. The settlement document is needed, in our view, solely to provide an uncontested basis for full German sovereignty.

Thus, we believe that the settlement document should be brief. It must make a few important but technical adjustments to make the legal situation in Germany correspond to the new political realities there. No more is needed. Moreover, the final settlement on Germany is not the appropriate document in rich to address the many detailed technical policy issues between the various parties. These can and will be settled elsewhere, bilaterally and multilaterally as sovereign acts of united Germany.

Not all of the participants in the negotiations agree with our preferred approach. Some—particularly the Soviets want to use the settlement to create important new obligations and commitments involving Germany. However, if our preferred approach prevails, the German settlement will direct itself to the fulfillment of four-power responsibilities and the termination of four-power rights. To the extent the new situation gives rise to new obligations, these will be undertaken in other documents—for instance in multilateral agreements on conventional arms limitations in Europe.

Against this background, Mr. Chairman, let me briefly address some of the general issues regarding the Senate's role on German treaty matters and survey the criteria that we will look at—together with the views of this committee and others in

the Congress—in making the final judgment as to the appropriate domestic form for the settlement.

The Senate has already played a significant role in the adoption of the individual pieces of the conclusion of peace with Germany, with the result that the few remaining matters are generally technical in nature:

—First, Congress and the President ended the state of war with Germany on October 24, 1951, when the President issued a proclamation pursuant to a joint resolution of Congress.

—Second, the Senate gave its advice and consent on July 13, 1953, to the Agreement on German External Debts, which resolved reparations and other key issues that would normally have been addressed in a peace treaty.

—Third, on July 1, 1952 and April 1, 1955, the Senate gave its advice and consent to the Convention on Relations Between the Three Powers and the Federal Republic of Germany and its related Protocol on the Termination of the Occupation Regime in the FRG, which resolved other key issues necessary to normalizing our relationship with West Germany.

Unlike the case of Italy, Japan, and the other axis powers, the business of regulating the peace with Germany was never addressed in a single document. But through a series of documents in the early 1950's, the Senate has already given its advice and consent to the elements of such a peace treaty with Germany.

The allied rights and other subjects which remain for negotiation, as part of the final settlement, are set forth and reconfirmed in executive agreements, not treaties. I am referring to such documents as the August 1, 1945 Potsdam Protocol, the June 5, 1945 Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority and the September 3, 1971 Quadripartite Agreement on Berlin.

I should also note that the desire to avoid a "peace treaty" is felt very keenly in Bonn. We have been at peace with Germany for 45 years, a peace officially declared by Congress in 1951. During 35 of those years the West Germans have been our trusted ally and they have won our confidence and admiration. They have long since ceased to be a vanquished foe and we do not wish to do anything that makes it appear as if we have approached the final settlement on Germany from opposing sides, rather than as the close allies that we are.

The Department of State's regulations on international agreements, contained in the Foreign Affairs Manual (11 FAM 720), set forth the general criteria we review in resolving the question of submission to the Senate. The first criterion and the most important—is the extent to which the settlement will involve commitments or risks affecting the Nation as a whole. As I have noted, we do not intend to enter into new obligations in the settlement document, but merely to solemnize our fulfillment of an old one—our obligation to promote the emergence of a democratic, sovereign, unified Germany within a community of democratic states. The settlement will not create new rights.

The Department's second criterion is whether the settlement is intended to affect state laws. The settlement as we now see it would not.

Third is whether the agreement can be given effect without the enactment of subsequent legislation. No legislation would be required to implement the settlement we foresee.

Fourth is past U.S. practice regarding similar agreements. As I have noted, the settlement in all likelihood will address those issues that we have traditionally included in executive agreements not submitted to the Senate.

Fifth, the criteria highlight the preference of the Congress as to the particular type of agreement.

Sixth is the degree of formality of the settlement. It is simply too early to assess this criterion. I would note, however, that it has been Bonn's strong desire, and also our preference, not to present this settlement as a peace treaty dividing victors and vanquished. This may effect the degree of formality desired.

Seventh, the criteria refer to the proposed duration of the agreement, the need for its prompt conclusion, and the desirability of concluding a routine or short-term agreement. The proposed settlement is intended to resolve permanently the comparatively narrow issues it will probably cover. Once the parties reach agreement, the sheer pace of events in Germany will make it desirable to bring the settlement into force expeditiously.

Finally, the criteria refer to the general international practice as to similar agreements. Some of the other parties may submit it to their parliaments. Others may not. However, this is a criterion we must treat with caution because the other states concerned have very different legal systems—as well as legal traditions that commend a different range of documents, with quite different legal form and criteria, to

legislative consideration, while simultaneously sharply limiting the role of parliamentary review of these agreements.

Mr. Chairman, these are the criteria we will weigh in addressing the proper form for U.S. adherence to the eventual settlement document. I cannot say what final conclusion they will support but I am confident that as the matters become clearer the Department will remain in close touch with you and your colleagues.

Returning to the two-plus-four agenda, I would also like to say a few words about why this goal of a united and democratic Germany free from four-power reserved rights is in the United States interest. These allied rights must be seen and understood within their historical context. The United States made a firm decision to impose a punitive peace upon a defeated Germany. We sought guarantees that Germany would not again threaten peace on the European continent and felt that the greatest guarantee would be in the establishment of a free and democratic Germany. The only reason these rights have continued to be of significance 45 years after the war is that the goal of a unified and democratic Germany could not be achieved in the postwar years. These reserved rights must be seen within the context of our ongoing responsibility to all the German people to facilitate the establishment of a unified and democratic Germany.

Thus, it would be a mistake to view these allied rights as rights vis-a-vis the Federal Republic or even the German Democratic Republic. They are rather rights which the Western allies, in close consultation with our West German ally, have preserved and maintained precisely to preserve the freedom of Germans living in the Western sectors of Berlin and to keep open the question of, and demonstrate our commitment to, a unified and democratic Germany. With the events leading up to and following the November 9, 1989, fall of the Berlin Wall, we have seen a courageous popular revolt in East Germany and the startling and, if I may say, exhilarating, process of reintegration of the two Germanys. The internal aspects of unification have already progressed to an advanced stage, with the two countries now sharing a common currency and economic regime and rapidly progressing to full social and economic unity.

Political unity has also progressed rapidly and its formal establishment is only a matter of time. The expansion of a liberal democracy, with a market economy and close ties to the Western Alliance, to all of Germany is clearly in the interests of the Western Alliance. It is, in fact, a triumph of democracy made possible by that Alliance. We are not engaged in the two-plus-four negotiations regarding the external aspects of unification in order to come to terms with the FRG regarding Germany unity. We, as well as the British and French, are already in full accord with the FRG regarding the end-point of this process—the establishment of a democratic and united Germany enjoying full sovereignty and free to choose its own alliances.

We are now making the effort in the two-plus-four negotiations, in coordination with our Western allies, to persuade the Soviet Union that it is also in its interest to support the establishment of a unified, democratic Germany, without future impediments on its sovereignty. We firmly believe it is not in the interests of anyone, including the Soviet Union, to singularize Germany and thereby create the potential for future resentment and instability.

In the decades since the establishment of the Federal Republic and its acquisition of full sovereignty, we have studiously preserved these rights as a means, perhaps the only means, of achieving a goal we share with West Germany—a German people living in peace and freedom and, as we have sought for over 40 years, in unity.

These phrases of peace, freedom, and unity often have a trite ring to them. I think it is a token of the times in which we are privileged to work that there are no others to describe the process that is now taking place on the European continent. Nothing, in our view, furthers U.S. interests more than contributing to that process.

The CHAIRMAN. Thank you very much, Mr. Young.

As I understand what you said, the decision has not yet been made on whether you will be sending up a treaty or some other kind of legal instrument, but you are setting forth some criteria that should be met if it is to be a treaty. Is that correct?

Mr. YOUNG. Yes, that is correct. From our Foreign Affairs Manual, those are the criteria we generally consider in evaluating what domestic form that agreement ought to take.

The CHAIRMAN. It would seem to me this is a little bit forced, since it is not in the constitution or from a body of law. State De-

partment regulations should not be the source of whether or not a document will be a treaty or an executive agreement, I would think.

Mr. YOUNG. Well, Mr. Chairman, that is a very good point, and I think—I do not mean to state by listing the criteria in that order that we are ignoring that body of constitutional law. These criteria have been developed to some extent in what I understand to be an attempt to reflect that body of constitutional law.

Moreover, I would like to assure you that we are also looking at a whole range of other agreements that have been conducted and entered into with the Federal Republic of Germany, as well as a whole range of other kinds of agreements that seemed to us arguably similar in any respect. And we are looking at the practice in that area as well, and we are looking deeply at the Constitution and the cases that have afforded us some interpretation of that Constitution as well.

Finally, I would stress, if I may, this is all very hypothetical at this stage, because we are not yet in a position to assert with any confidence what the document will look like. And so far, we are basically listing considerations we will consider. I have tried to tell you what else we are doing to study the matter, but it is being done somewhat in the abstract at the moment.

The CHAIRMAN. Are you familiar with the 1978 Senate resolution stating that the President should, prior to and during the negotiation of an agreement, seek the advice of this committee as to whether such agreement should be in the form of a treaty or not?

Mr. YOUNG. Yes, Mr. Chairman. I am aware of that.

The CHAIRMAN. I would hope that that would be honored, and in that regard, other than discussions with our staff in preparation for today's hearing, I am not aware that those kinds of consultations have taken place with respect to issues concerning or relating to Germany. Am I correct about that?

Mr. YOUNG. Mr. Chairman, I am not sure. I can certainly find out for you if other discussions have taken place, but at least we in the legal advisor's office have not discussed this aspect, again, in large part because we have only in the last few weeks, if even then, begun to get a sense, even the vaguest sense, of what this outline might look like. And so I think it, at least on our part, we have largely left it to the policy side of the Department to discuss what has been, up to this point, largely a set of policy-related discussions.

The CHAIRMAN. But you are here as a representative of the State Department, not just the legal advisor's office, so you speak for the State Department I would think.

Mr. YOUNG. Certainly.

The CHAIRMAN. In that regard, have there been any consultations with the Congress which have taken place concerning Germany, or is there some reason why you believe that the Senate resolution and circular 175 do not apply in this case?

Mr. YOUNG. Mr. Chairman, first, I have no reason to think that Circular 175 does not apply in this case. And I am not aware of any consultations that have taken place, but I would certainly be happy to go back and find out if any have occurred.

The CHAIRMAN. Is there any reason, from the viewpoint of policy, foreign policy, as distinguished from international law, that you think it would be a bad idea to have a treaty?

Mr. YOUNG. Well, we do need to start out with the understanding, at least as a matter of international law, the distinction we customarily draw, for domestic purposes, between a treaty and an executive agreement is not a relevant distinguish. All agreements entered into that are intended to have binding force under international law do, regardless of what domestic procedures are used to formulate those as a matter of domestic law.

With respect to a peace treaty, we have articulated a number of concerns with respect to why we think it should not be nominated a peace treaty, and I think there are a series of those that I may just outline briefly, if that would be useful.

One is that we, as I mentioned in my testimony, we have, in fact, been at peace for a very long time with Germany, and feel rather strongly that presenting this as a treaty in which we are negotiating a peace, that Congress has declared some many years ago, is something that puts the Germans in, obviously, a very awkward position. They have been for over three decades very responsible international actors, members of the United Nations, signatories to the Helsinki Final Act, members of the Non-Proliferation Treaty, and so forth. And they are very sensitive to that.

I think from the perspective of the United States, there may be reasons not to cast it that way as well. As you may know from various accounts in the newspapers and elsewhere, the Soviets have been somewhat more keen on the idea of nominating this a peace treaty, and that, I think is in part, something they may have done to retain some leverage, continued leverage over an important Western ally, West Germany.

And that, to the extent, though they are walking away some from this position, perhaps, to the extent they have been oppressing that formulation of the process, has not been one we have been very comfortable with, because it would put us on the side of the Soviets negotiating against our close ally, over things that we do not particularly want to negotiate in this forum: Soviet troop presence in Germany, German troop limitations and the like. And accordingly, having this nominated and structured as a treaty negotiation in that sense has been one that we think would not advance U.S. interest, very clearly.

The CHAIRMAN. Well, I thank you very much, indeed, and thank you for being with us.

We will now turn to a panel of witnesses who bring special expert knowledge to the subject of our hearing. We have Prof. Arthur Bestor, an eminent constitutional historian who is Professor Emeritus of History at the University of Washington; Mr. Richard Smyser, who has been Political Counselor of the U.S. Embassy in Bonn and has written two books on Germany; and Prof. Anthony D'Amato, a specialist in international law on the faculty of Northwestern University's Law School. We are delighted they can be with us.

You are excused, Mr. Young. Thank you. I would add there may be some questions for the record that some of my colleagues may

be asking the Department, so the record will stay open for a period of time.

Mr. YOUNG. That will be fine. We will be delighted to respond to those.

The CHAIRMAN. Great. Thank you very much.
[The information referred to follows:]

RESPONSES OF MR. YOUNG TO QUESTIONS ASKED BY SENATOR HELMS

Question. What is the status of the United States claims program with the German Democratic Republic? What is the current value of these claims?

Answer. Between 1982 and 1988, the State Department held nine rounds of negotiations with the GDR on U.S. citizens' property claims, but was unable to reach a settlement.

In August of this year, U.S. experts briefed FRG officials on the nature and background of the claims that had been the subject of negotiations between the United States and the GDR, and explained that we were unable to resolve the claims with the GDR.

New German laws may provide some United States citizens a means of restitution of property taken by the GDR. We have told the FRG that although these laws may apply to some United States citizens' claims, the FRG and the United States Government must discuss the United States citizens' claims at an intergovernmental level to ensure that all of the claims are satisfactorily resolved.

In a September 18 letter to Secretary Baker, FRG Foreign Minister Genscher responded by giving the following assurance with respect to the claims: "Without prejudice to any other claims issue, the Government of the Federal Republic of Germany will resolve in intergovernmental discussions with the Government of the United States shortly after unification the claims of United States nationals that have been the subject of governmental negotiations between the Governments of the United States and the German Democratic Republic."

The principal value of the claims, as determined by the Foreign Claims Settlement Commission, is \$77.8 million.

Question. What is the policy of the U.S. Government with respect to ensuring that these valid claims of U.S. citizens are settled fairly?

Answer. The U.S. Government seeks to reach an equitable settlement of these claims soon after unification.

Question. It is the committee's understanding that under international law, a reunified Germany would be responsible for United States property claims against the German Democratic Republic. Please comment and cite precedents to support this view.

Answer. The Department shares the committee's understanding that after unification, the unified Germany will be responsible for these claims. The letter from Foreign Minister Genscher confirms that this understanding is also shared by the Federal Republic of Germany.

Question. What actions or steps will the United States Government be taking to settle these claims with the Federal Republic of Germany and or a reunified Germany?

Answer. We expect to have additional discussions of the claims at an intergovernmental level with the Federal Republic of Germany soon after unification, as described in Foreign Minister Genscher's letter of September 18.

Question. There have been suggestions that U.S. claimants may be required to refile their claims with a reunified Germany and be subjected to further expense to assert their claims and further delays in receiving compensation. What is the U.S. Government position on such a possibility?

Answer. We have informed U.S. claimants of the new German restitution laws, which have an October 13 deadline for registering claims.

We have also informed them that U.S. claimants whose claims have been espoused by the U.S. Government need not refile their claims under the new German laws on restitution of property taken by the GDR in order for their claims to be resolved through negotiations between the United States and the Federal Republic of Germany.

The German restitution program creates an opportunity for claimants whose claims were not accepted by the U.S. Foreign Claims Settlement Commission to pursue their claims in another forum.

In addition, some claimants with awards from the Foreign Claims Settlement Commission may wish to consider whether to seek recovery of their property through the German program.

Question. Has the issue of payment of U.S. claims been discussed at the "2+4" German reunification talks? Wouldn't it be appropriate to seek an agreement "in principle" that a new Germany will honor United States property claims against the GDR?

Answer. No, the issue of bilateral claims was not discussed as part of the "2+4" talks.

The issue of United States claims has been discussed a number of times at the ministerial level, as well as the experts level, between the United States and the FRG.

After high-level discussions between the United States Government and the FRG, Foreign Minister Genscher sent a September 18 letter to Secretary Baker that contains an assurance that the Federal Republic of Germany will resolve the United States claims in intergovernmental discussions with the United States Government shortly after unification.

Question. Have there been any bilateral discussions between the United States and the FRG on the subject of United States claims? Has the FRG given any assurances to the United States Government that it intends to honor United States claims?

Answer. The issue of United States claims has been discussed a number of times at the ministerial level, as well as the experts level, between the United States and the FRG.

After high-level discussions between the United States Government and the FRG, Foreign Minister Genscher sent a September 18 letter to Secretary Baker that contains an assurance that the Federal Republic of Germany will resolve the United States claims in intergovernmental discussions with the United States Government shortly after unification.

Question. Considering the low valuation assigned to expropriated property in East Germany by the Foreign Claims Settlement Commission and the prospect that dramatic changes in economic conditions in former GDR territory following reunification will result in significantly higher property values; will/should United States claimants have the option of reclaiming their property (as will West Germans) or accepting compensation when the United States claims are finally settled?

Answer. The Department recognizes that some claimants may prefer to seek restitution of their property through the German domestic program.

The Department will take these claimants' concerns into account in discussing the claims with the FRG.

It may be possible to agree on a mixed settlement, in which U.S. claimants can choose which program they would prefer to pursue.

Question. What steps is the U.S. Government taking to keep U.S. claimants advised of developments as they occur?

Answer. On August 31, the Department issued a notice to the press briefly describing the new German restitution laws, and pointing out that the deadline for registering a claim in the German domestic program is October 13, 1990. The notice was picked up by the Washington Post and the Wall Street Journal, among other newspapers. In addition, we gave the notice to journals that primarily serve the German American community.

On September 11, the Department published the text of the notice in the Federal Register.

In early September, the Department and the Foreign Claims Settlement Commission mailed out packages of information to each of the 4,000-plus individuals who filed claims with the Foreign Claims Settlement Commission in the 1970's. Because the German domestic program may provide an opportunity for those claimants whose claims were denied by the FCSC, as well as for those whose claims were approved, the package was sent to all of those who filed applications.

The package described the current status of the claims, and included copies of the German law governing registration of claims, a sample application, descriptions of the law provided by the FRG, a list of attorneys in the GDR, and a list of the addresses with which claims should be filed in the GDR. Many of the documents were provided in German and in English.

In addition, the Department and the FCSC have sent out many copies of the package in response to inquiries by potential claimants.

We anticipate that we will notify claimants again of other important developments with regard to their claims.

The CHAIRMAN. So, Professor Bestor, Mr. Smyser, and Professor D'Amato, if you would come forward. I would add that we hope that each of you will try to summarize your statements and limit them to 10 minutes each.

And we will start out with Professor Bestor. Very glad to welcome you here.

**STATEMENT OF ARTHUR BESTOR, PROFESSOR EMERITUS OF
HISTORY, UNIVERSITY OF WASHINGTON**

Mr. BESTOR. Senator, it is a great honor, always, to be invited to address this committee. I am pleased by it personally, but I am more particularly pleased with the subject in which the Senate is now engaged; namely, examining in advance, as early as possible, the implications for our own foreign policy of whatever commitments are made in whatever form abroad.

I should, therefore, like to talk about the intent of the Constitution, for my field is constitutional history. As a historian I do go back pretty far in time, and I plan to discuss issues from that point of view, leaving to my colleagues on the panel the problem of discussing current problems connected with the making of peace with Germany.

Let me remind you that the Constitution deals, and I will quote it, with treaties in two or three places. "He," it says, meaning the President, "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." It goes on to say that, "He shall nominate, and by and with the advice and consent of the Senate,"—but in this case not two-thirds of them—"shall appoint ambassadors and other public ministers and consuls." In another section it makes treaties the supreme law of the land to be enforced, along with the Constitution and the statutes of Congress, as part of that supreme law.

What I particularly want to talk about, however, is the phrase "advice and consent." Narrowing it even further, I want to talk a bit about advice. What does "advice" mean in terms of consultation?

The formula is a very old one, indeed, though not always phrased in precisely the same language. Nevertheless, for more than a century prior to the American Constitutional Convention, it was an unvarying term, and it is incorporated in every British statute in the form, "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled."

This is the crucial phrase which gives validity to a statutory enactment. It is not the only place where the phrase was used, but it was always used in the same solemn sense. It was applied also to the Privy Council the body to which the King could immediately turn. In the middle of the 17th century, when Parliament asserted to its interest and authority as against the King, the assertion took the form of nineteen propositions by Parliament, maintaining that, "the great affairs of the kingdom may not be concluded or transacted by the advice of private men, or by any unknown or unsworn councilors." It went on: "no public act concerning the affairs of the

kingdom"—now referring to orders from the King himself—"may be esteemed of any validity, as proceeding from the royal authority, unless it be done by the advice and consent of the major part of your council, attested under their hands."

Sometimes, the clause of the U.S. Constitution giving the President authority to make treaties by and with the advice and consent of the Senate is read as if the latter part merely gave the Senate the chance, at the end of a process of negotiation, to answer the simple question, Shall we take it or not take it?

I would argue that "advice" means far more than that. And to show the importance of that word, I would like, very briefly, to summarize what went on in the Constitutional Convention before that particular clause was introduced into the provision dealing with treaties, a change made in the very last days of the session.

When the Convention first met in May 1787, it gave first attention to the Virginia Plan, so called. The plan call for three branches, but said no more than that the President should have, under the new Constitution, those executive powers that were contained in the Articles of Confederation, the preceding constitutional document.

The problem with that statement was that powers were never listed as executives in the Articles, for there has been no separate executive. As a consequence, on the June 1, 1787, 3 days after presentation of the Virginia Plan, there was a debate on the subject in which four of the leading members of Congress, took part—Madison, James Wilson, Charles Pinkney, and John Rutledge (one of whom would later become President and two others Justices of the Supreme Court. All took the position that executive rights did not include the power of peace and war.

At a mid-point of the Convention, a committee was appointed, call the Committee of Detail, to draw up a draft Constitution. And what the committee decided was that the power to make treaties and appoint ambassadors was a power that should belong to the Senate exclusively. No mention, whatsoever, was made of any executive participation in either treaty-making or diplomatic appointments.

In the remaining month and half, roughly, of the Convention, the whole of the committee's document was gone over. The main objection to assigning the power to the Senate without mentioning any other branch, was the omission of the House of Representatives.

Finally, at the beginning of September, a compromise was reached which brought the President back into the picture for the first time in the discussions of the Convention, except for a couple of comments made by Madison, and one proposal, or rather sketch of a proposal, made by Hamilton. The provisions finally adopted gave the President the power to make treaties—a power to be exercised by and with the advice and consent of the Senate.

One should concentrate upon what "advice" meant. It seems to me there is no easy way of arguing other than that it meant consultation in advance of final determination. Indeed, in an article which I published a short time ago, for the *American Journal of International Law*, I gave as its title, "'Advice' From the Very Beginning, 'Consent' When the End Is Achieved."

This sums up, pretty well, my own position on the constitutional question. Therefore, to drive it home, I would like to read a paragraph or two from that, the conclusion of that article.

The phrase "by and with the advice and consent of the Senate," constituted for the Framers a requirement that in performing the executive segment of the task of conducting foreign relations, the President is to seek the formal advice of the Senate—a deliberative body responsible to the electorate and not to him—concerning the policy to be pursued and the ends to be sought. In accord with everyday usage, the Framers considered "advice" to be something given not only at the outset of an enterprise, but also at subsequent stages, so long as the processes of negotiating should on.

Negotiations with foreign powers are necessarily under the direction of the President this being the executive component of treaty making. It is therefore, he who must decide—subject to further advice as needed—when and what to yield in the give-and-take of bargaining. Concessions made by both parties are bound to result in a treaty different in various respects from the one the President was previously advised to seek. It then becomes the responsibility of the Senate to decide whether to give its consent—by a vote of two-thirds of the members present—to the alterations made in the policy it originally advised, or to reject the treaty as involving an unacceptable departure from the policy it has advocated.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bestor follows:]

PREPARED STATEMENT OF ARTHUR BESTOR

May I begin by saying how greatly I value the honor done me by the invitation to address, not for the first time, the Committee on Foreign Relations of the U.S. Senate. Pleasant though this invitation is to me personally, it is overshadowed by the exhilaration I feel as a citizen that the Senate, in these times of historic change, is reasserting, by means of hearings like this, its constitutional role as the one agency of the Government that is specifically authorized to give formal "advice" to the President on issues of international scope that are only beginning to arise but must at a later stage be dealt with by treaty.

This, I believe, is the role that the Framers intended the Senate to play. Its assigned responsibility, as I understand the Constitution, is to advise the President on foreign policy from the moment that problems of international scope loom upon the horizon. It does not discharge this responsibility by waiting for the executive branch to define policy and embody it in a fully negotiated treaty, thereby offering the Senate only the choice between saying "Yes" and saying "No."

In this prepared statement I propose to examine the historical evidence that leads me to the just-stated conclusion. A first section will give attention to the meaning that attached to the word "advice"—whenever used in a constitutional context—"during two centuries of constitutional development in England prior to the American Revolution.

A second section will trace the sequence of discussions and decisions in the Federal Constitutional Convention of 1787 which led it in the end to choose the phrase "by and with the advice and consent of * * *" as the proper one for defining the special relationship between the President and the Senate in the making of treaties and therefore in the formulation and implementation of crucial policies in the realm of foreign affairs.

In a concluding section I put aside the academic robes of a historian and put on the everyday garb of a citizen and voice my own opinions—well-informed, I trust, but opinions still—concerning the appropriate and proper way for the Senate to fulfill its responsibility for helping find wise and effective ways through the thicket of problems that confront the world today and tomorrow as regimes in Eastern Europe crumble, as World War II and the Cold War are finally liquidated, and as change comes, almost like the repeated rumblings of an earthquake, to nations on almost every continent of the world.

ON THE MEANING OF THE PHRASE "ADVICE AND CONSENT"

At the time the Constitution was adopted, the phrase "by and with the advice and consent of * * *" was recognized as a technical term, regularly used in constitutional contexts both British and American. Its most conspicuous appearance was in the enacting clause of a British statute. Today, as in the 18th century and long before, every measure that becomes law in England employs this unvarying formula: "Be it

enacted by the King's [or Queen's] most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same * * *

As a description of the actual legislative process, this formula could no longer be taken literally in 18th century Great Britain. And in the United States it has never been part of the enacting clause of domestic statutes. Nevertheless the formula is a meaningful one. Hallowed by tradition, it links the present to the past by harking back to the origins of Parliament, when that body had been simply the great council of the King, summoned to consult with him and to approve the measures he proposed to put into effect. And the phrase "advice and consent" remains valid as a description of the close and continuous consultation, often face to face, that goes on between a ruler and a privy council or council of state. This is the reason for its appearance in the U.S. Constitution as the appropriate formula in which to prescribe procedure in matters of foreign policy and matters of appointment, activities clearly distinguishable from those connected with domestic lawmaking.

The constitutional implications of this consultative relationship were set forth with admirable clarity in a 17th century document presented by Parliament to King Charles I on the June 1, 1642—the so-called Nineteen Propositions. Parliament was protesting the King's attempt at personal rule and was demanding adherence to the principle "[t]hat the great affairs of the kingdom may not be concluded or transacted by the advice of private men, or by any unknown or unsworn councillors." The document insisted that there were two ways and two ways only in which governmental power might legitimately be exercised. One was the legislative way: "[S]uch matters as concern the public" (in the sense that they are to be dealt with by statutory law) must be "debated, resolved and transacted only in Parliament, and not elsewhere." Alternatively, "such other matters of state as are proper for your Majestys Privy Council shall be debated and concluded by such of the nobility and others as shall, from time to time, be chosen for that place, by approbation of both Houses of Parliament." In sum, "no public act concerning the affairs of the kingdom * * * may be esteemed of any validity, as proceeding from the royal authority, unless it be done by the advice and consent of the major part of your council, attest- ed under their hands."

As the document made clear at the outset, "advice," in a constitutional sense, was considered to be something that only certain official bodies, and never mere "private men," were authorized to give. This principle underlies an often overlooked distinction embodied in the U.S. Constitution, which employs the word "advice" only when referring to counsel given by the Senate to the President, and speaks merely of "opinion" when referring to whatever the President may seek or receive from subordinate officers within the executive branch—his appointees, whose tenure is at his pleasure. The President, says the Constitution, "may require the Opinion, in writing, of the principal Officer in each of the executive Departments."

Taken together, the Nineteen Propositions of 1642 propounded the principle that neither statutes nor proclamations, nor other official decrees and commands, were to be "esteemed of any validity" unless made with the "advice and consent" of some body independent of the King, either both houses of Parliament (one of which was elective) or the Privy Council (whose members were appointed, but only with the "approbation" of both Houses).

The giving of advice, in this constitutional sense, was traditionally considered a very serious business, imposing grave responsibilities on the individuals legally authorized to give it. The perception of this was as clear in America as in England. At the Federal Constitutional Convention in 1787, for example, Elbridge Gerry of Massachusetts insisted that councillors were to be held strictly accountable for advice given in an official capacity: "[T]heir opinions may be recorded—they may be called to accoun[t] for th[ei]r opinions & impeached—if so their Responsibility will be certain, and in Case of misconduct their punishment certain."

In the English colonies in America, the formula "with the advice and consent of * * *" was in regular use in the instructions given by the King's Privy Council to the governors of royal colonies. The governor possessed the usual range of purely executive powers, to be exercised on his own authority. But a Council was also appointed in the King's name, made up of influential inhabitants of the colony. On certain specified matters of public importance the royal governor was to act only "with the advice and consent of our said council." This requirement served to distinguish the powers the governor might exercise at his own discretion from those that he might employ only after consulting with, and receiving the approval of, a separate political body chosen in such a way as to ensure a high degree of independence in its advice.

When independence came, the constitutions adopted by the American States in 1776 and following years echoed colonial precedents by using the formula "advice and consent" to describe the working relationship between a chief executive and a privy council or council of state.

The largest of the States, Virginia, adopted its first constitution on the June 29, 1776, just days before the Declaration of Independence. The document established a bicameral General Assembly composed of a House of Delegates and a Senate. A Governor was to be chosen by joint ballot of both houses, who "shall, with the advice of a Council of State, exercise the executive powers of government." This body, called also a Privy Council, was to consist of eight members chosen like the Governor by joint ballot. "[T]heir advice and proceedings," said the constitution, "shall be entered on record, and signed by the members present, (to any part whereof, any member may enter his dissent) to be laid before the General Assembly, when called for by them"—a requirement amplifying that laid down a century and a quarter earlier in the Nineteen Propositions.

Though the Virginia constitution spoke only of "advice," other State constitutions mentioned both "advice" and "consent," thus emphasizing the difference between the two. In some cases the governor was to act with the "advice" but not necessarily the "consent" of a council, presumably leaving him free in the end to exercise his own discretion. On the other hand, "consent," used by itself, seems to have signified approval given to some action proposed by the executive without prior consultation, but not to be put into effect by his authority alone. Finally, "advice and consent" clearly meant a combination of both the right of the council to be consulted while a course of action was in the planning stage, and its right to give or withhold approval at the end.

When, in its completed version of the Constitution, the Federal Convention of 1787 assigned the treaty and appointment powers to the President "by and with the Advice and Consent of the Senate" (instead of creating a separate Council of State as several members believed necessary¹), the fact that the phrase "advice and consent" was used to describe the relationship between the two partners is evidence that the Framers conceived of the Senate, when performing this special function, as being a council-like body available for consultation with the executive at every stage in the process of initiating, developing, and implementing the basic foreign policies of the Nation.

PROCEEDINGS IN THE PHILADELPHIA CONVENTION

In the months before the start of the Federal Convention of 1787, advocates of a thoroughgoing revision of the decade-old Articles of Confederation struck up an extensive correspondence among themselves, scattered as they were among the several States. Most of the participants in this informal communications network were agreed that every power previously concentrated in Congress should be dissected into its functional parts—legislative, executive, and judicial—and assigned to distinctive branches of Government, each responsible for handling its particular facet of the multipartite operation by which any given problem must be dealt with. As John Jay put it in a letter to Washington on January 7, 1787, 4 months before the Convention was scheduled to begin, "Let Congress legislate—let others execute—let others judge."²

Though there was agreement on the general principle that power should be distributed instead of being concentrated in one body, scant attention was paid to the question of the difference between executive and legislative power. State constitutions could provide some guidance, but only where domestic affairs were concerned, for the Articles of Confederation had already assigned to the Federal Government a monopoly of authority in the domain of foreign affairs.

Even James Madison showed uncharacteristic vagueness respecting the nature and scope of executive power. In a letter he wrote to George Washington 4 weeks before the Convention opened, Madison insisted that "[a] national Executive must

¹ When on Sept. 7 the Convention finally rejected the idea of a Council of State, George Mason of Virginia, its principal advocate, exploded that "we were about to try an experiment on which the most despotic Governments had never ventured." ² FARRAND, RECORDS at 541. The worst possible outcome, he warned in a memorandum of objections to the completed Constitution, would be that "a Council of State will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country." *Id.* at 638. In the end Mason was one of the three members who, in Madison's words, "declined giving it [the Constitution] the sanction of their names." *Id.* at 649.

² ³ JOHN JAY, CORRESPONDENCE AND PUBLIC PAPERS 227 (H. Johnston ed. 1891) (Jay to Washington, 7 Jan. 1787).

"* * * be provided," but he went on to confess: "I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be clothed."³

Equally indeterminate was the provision respecting executive power contained in the first plan laid before the Federal Convention. This, the so-called Virginia Plan, was presented by Edmund Randolph, governor of that State, on Tuesday, May 29, 1787, the third full day of the session. The plan took for granted that there should be a National Legislature, a National Executive, and a National Judiciary. But though separate articles were devoted to each, all the Virginia Plan had to say about the power of the executive was this: "[B]esides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."⁴ The apparent definiteness of the clause was illusory, for the Articles of Confederation, having created no other branch of government but Congress, never purported to classify powers as executive or legislative or judicial.

So vague a provision left open the possibility that "Executive rights" might be so construed as to include the "right and power of determining on peace and war," and the corollary powers of "sending and receiving ambassadors" and "entering into treaties and alliances"—all of which the Articles of Confederation had vested in Congress.⁵ Fear that the Virginia plan might mean turning these powers over to the executive gave rise to a crucial debate on Friday, June 1, 1787, only 3 days after the presentation of the Virginia Plan.

In the first speech of the day, Charles Pinckney of South Carolina declared that he "was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c. which would render the Executive a Monarchy, of the worst kind, to wit an elective one." He was supported by a colleague from the same State, John Rutledge, who announced that he "was for vesting the Executive power in a single person, tho he was not for giving him the power of war and peace."

Even more pointed were the speeches of two of the Convention's most influential members, James Wilson of Pennsylvania and James Madison of Virginia. Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."⁶ According to another delegate's report, Wilson said also that "[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."⁷ Madison supported Wilson's interpretation of international legal opinion, commenting that "executive powers *ex vi termini* [i.e., by force of the words themselves] do not include the Rights of war & peace &c."⁸ In the day's debate no delegate took a position contrary to that expressed by Wilson, Madison, and the two South Carolinians. And in the end the Convention voted to strike out the equivocal reference to "Executive rights vested in Congress by the Confederation."⁹

Of the four speakers who denied that "the power of war and peace" is "an executive power, Madison alone was prepared to grant the President a share in that power. "[P]robably the best plan," he suggested, "will be a single Executive of long duration w[i]th a Council, with liberty to depart from their Opinion at his peril."¹⁰ Two and a half weeks were to elapse, however, before any speaker offered a fully developed plan giving the executive so much as a participatory role in the conduct of foreign relations.

It was Alexander Hamilton of New York who offered such a proposal, in a speech that occupied most of the day on June 18.¹¹ Frankly avowing his wish for a greatly strengthened federal government and a vigorous executive, Hamilton exclaimed "Let one executive be appointed who dares execute his powers."¹² And he argued

³ 9 JAMES MADISON, PAPERS 385 (R. Rutland, ed., 1975) (Madison to Washington, 16 April 1787).

⁴ 1 FARRAND, RECORDS 21 (resolution 7).

⁵ Articles of Confederation and Perpetual Union, art. 9, para. 1 (1781), in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 39 AT 42 (C. Tansill ed. 1927) 27 at 31.

⁶ 1 FARRAND, RECORDS at 64-66 (Madison's notes).

⁷ 1 *id.* at 73-74 (William Pierce's notes).

⁸ 1 *id.* at 70 (Rufus King's notes).

⁹ 1 *id.* at 63-64 (Journal), 67 (Madison's notes).

¹⁰ 1 *id.* at 70 (King's notes).

¹¹ 1 *id.* at 282-93 (Madison's report of Hamilton's speech, its correctness vouched for by the latter). Cf. the extensive reports by Yates and King, *id.* at 294-304.

¹² 1 *id.* at 300 (Yates' notes).

that the executive should have tenure for life.¹³ Given such views, Hamilton might have been expected to controvert the opinions advanced by Pinckney, Rutledge, Madison, and Wilson in the debate of June 1, and to maintain instead that "the right and power of determining on peace and war" was essentially and primarily executive in nature.

Hamilton, however, took no such position. In this and his other speeches in the Convention, he consistently treated the executive's role in foreign affairs as that of a partner with the upper house of Congress. In the plan (or "sketch," as he called it) which he read at the end of his remarks on June 18, he carefully specified the segment of power that was to be assigned to each branch. The "Supreme Executive authority" (to which he gave the title of Governor) was "to have with the advice and approbation of the Senate the power of making all treaties." Reiterating the point in the separate article devoted to the Senate, the plan listed among the powers of that body "the power of advising and approving all Treaties."¹⁴

Hamilton described his plan as a sketch, intended "only to give a more correct view of his ideas," and not to be considered "as a proposition to the Committee." Accordingly, though Hamilton's presentation was considered by one delegate "the most able and impressive he had ever heard,"¹⁵ his plan was never the subject of a formal debate.

During the month that followed, questions of executive power were in fact pushed aside by a crisis that threatened the very continuance of the Convention. The issue was representation—whether seats in Congress should be apportioned on the basis of population, or whether (as under the Articles of Confederation) each state should have an equal voice. The deadlock was not broken until July 17 when the so-called Great Compromise on representation was accepted.¹⁶ Quickly thereafter the Convention turned its attention back to broader questions of constitutional structure and power.

So rapidly did matters then proceed that by Thursday, July 26, the Convention was able to turn over to a specially created Committee of Detail the task of translating into formal constitutional articles the various principles that the Convention had agreed to—or had leaned toward approving—in the course of its initial 2 months of debate.¹⁷

The report of the Committee of Detail, presented on Monday, August 6, was one of the key documents in the history of the Convention. It provided the draft of a complete constitution, the clause-by-clause examination of which occupied the Convention from that time forward. In particular, the Committee in its report at last came to grips with the problem of distinguishing executive from legislative power in the handling of foreign affairs. Except for Hamilton's "sketch" of June 18, which was not put formally before the Convention, the Committee report was the first official document to get down to specifics—and its specifics turned out to be markedly different from Hamilton's.

The vaguely inclusive phrase "power of war and peace" had figured most of the earlier Convention debates. The Committee of Detail, however, recognized that the power to wage war and the power to negotiate treaties involve totally different procedures and responsibilities. In its draft constitution, accordingly, the two matters were dealt with separately, and authority was allocated differently.

The distinction between the constitutional procedures requisite to the making of treaties (including treaties bringing about peace), and those called for in the making of war is a distinction of fundamental constitutional importance, necessary to explain both the allocation of authority proposed by the Committee of Detail and the quite different one ultimately prescribed in the finished Constitution. In treaty-making there is always an outside participant in the decision-making process—to wit, the other power, with whom terms must be negotiated. By contrast, in carrying on a war, the decisions are the nation's own. The enemy is the enemy—a threat to be countered, not a partner whose wishes are to be consulted and accommodated.

¹³ 1 *id.* at 289-90, 292 (Madison's notes).

¹⁴ 1 *id.* at 291-93.

¹⁵ 1 *id.* at 293 n.9 (Gouverneur Morris, as quoted by J.C. Hamilton).

¹⁶ 1 *id.* 524 (Journal, 5 July); 2 *id.* 13-14 (Journal, 16 July); 2 *id.* 19-20 (Madison's notes on a meeting of delegates from the larger states on the morning of 17 July "before the hour of the Convention"); 2 *id.* 25 (Madison's notes on session of 17 July).

¹⁷ The committee was created on the 23rd of July "for the purpose of reporting a Constitution conformably to the Proceedings aforesaid." Because it was to be a working committee, it was kept small. By a succession of Convention votes its size was whittled down to five members from the original proposal of one member from each state. 2 FARRAND, RECORDS at 85-87, 117-118, 128, 129-34.

So far as the war power is concerned, the distribution of constitutional authority does not, in theory at least, differ necessarily from the distribution called for in the handling of domestic matters. Legislative power is still the power to make laws; executive power, the power to make them effective. The two species of power be kept separate so long as the tendency of war to foster dictatorship is successfully resisted. With commendable optimism, the Committee of Detail distributed the powers connected with war in roughly the same manner as were the governmental powers exercised on domestic matters, thereby extending to military affairs the system of checks and balances.

The Committee seems to have found no particular difficulty distinguishing the executive from the legislative function where war was concerned. The experience of the Revolution, if nothing else, was a warning against confusing legislative authority to determine policy with a license to interfere in—to micro-manage—military operations themselves. Aware of past complaints and criticisms, the Committee of Detail proceeded to mark out a line between executive and legislative responsibilities. It concentrated the function of military command in the executive, designating him "commander in chief of the Army and Navy of the United States, and of the Militia of the Several States."¹⁸

At the same time, the Committee of Detail took care to place clearly and explicitly in legislative hands various important powers that a commander-in-chief might otherwise be tempted to regard as corollaries of the one kind of power actually given him. Included among the powers listed as legislative were these: "To make war; To raise armies; To build and equip fleets; [and] To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions."¹⁹

Military command was separated from the authority to decide the momentous question of going to war, unless a sudden attack should require immediate action. Except under such circumstances, the two different but interrelated parts of the war power were distributed between the two branches of government—the authority to decide on war being the legislative segment, the power to conduct the operations of war being the executive one. The principle of checks and balance was thus established in full force in military matters, with a distribution of powers by function providing the means of doing so.

The Committee of Detail indicated quite emphatically that the powers of the commander-in-chief were military powers, carrying with them no implication that authority in the realm of diplomacy was part of the package. This separation of military command from diplomatic negotiation continued the tradition that had been maintained throughout the Revolution. George Washington had been named commander-in-chief at the very beginning, but diplomatic negotiations were then and thereafter carried on by appointees of Congress, acting under instructions drawn up by that body.

In contrast with its handling of the war power, the Committee of Detail proposed no comparable dissection and distribution of the treaty-making power. Any supposed analogy with procedures in domestic legislation was apparently considered irrelevant. Although in the Constitution ultimately adopted, treaties are classified as parts of the supreme law of the land, it must nevertheless be recognized that a treaty is a unique kind of law, so far as its making is concerned. No domestic authority or combination of authorities can *enact* a treaty. The only thing that can be decided upon in advance by such an authority or authorities is the result to be *sought*. Negotiation with a foreign power must follow. Then a final decision to accept or reject the resulting treaty must be made, now once again by the wielder or wielders of domestic authority. Only thereafter does *executive* authority in the ordinary, unambiguous sense come into play, the clearly defined responsibility of that branch being to "take Care that the Laws [including treaties] be faithfully executed."²⁰

It is an open question whether, in the complicated process of making a treaty, the stages prior to the final and unequivocally executive stage of putting it into effect ought to be labelled legislative or executive. In *The Federalist* in 1788, immediately after the Convention, Hamilton discussed "the particular nature of the power of making treaties," and concluded that "if we attend carefully to its operation, it will

¹⁸ *Records*, ed. Farrand, 2: 185. Cf. U.S. Constitution, art. 2, 2, cl. 1, which is the same except for the addition of this qualifying phrase respecting the militia: "when called into the actual Service of the United States."

¹⁹ *Records*, ed. Farrand, 2: 182. Cf. U.S. Constitution, art. 1, 8, cls. 10-16.

²⁰ U.S. CONST. Art. 2, 3.

be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."²¹

In the face of ambiguity like this, the Committee of Detail decided to put the treaty power in all its aspects in a single body, separate from the executive branch and different from the bicameral legislature. In its draft constitution, the Committee recommended the following provision: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."²²

Excluded from the treaty-making process, in this proposed assignment of authority, were both the House of Representatives and the President. Even a veto power was denied to the latter in treaty matters. In diplomacy only a ceremonial function was conceded to the chief executive. He was authorized to *receive* foreign ambassadors, but the power to *appoint* to American diplomatic posts abroad was denied him. The Committee obviously believed that the commissioning of American envoys to foreign countries, not the reception of foreign ones, was the power with major implications for policy, and (as we have seen) it vested such appointments in the Senate, with no formal role for the President aside from signing their credentials. That the Committee considered the President's proper role to be that of a communicator, not a policy-maker, was further suggested by its bracketing of two presidential powers in a single sentence: "He shall receive Ambassadors, and may correspond with the supreme Executives of the several States."²³

The decision of the Committee of Detail to allocate power in this way is understandable. The Convention had adopted no resolutions on treaty-making or diplomacy. Though Hamilton had proposed a clear distribution of authority in treaty-making, he had not placed his plan on record as a formal proposal. From the Committee's point of view, the only truly relevant debate on the subject had been the one that took place on June 1, when four delegates had spoken against, and none in favor of, placing "the power of war and peace" in executive hands. In effect, the Committee was accepting Wilson's contention that "[m]aking peace and war are generally determined * * * to be legislative powers."²⁴

What proved to be controversial in the report of the Committee of Detail, where foreign affairs were concerned, was not the exclusion of the President from the treaty-making process, but the denial of a role therein to the other legislative chamber, the House of Representatives. Again, the reason for the choice is quite clear. From the very beginning of the Convention the Senate had been envisaged as a comparatively small body, its members chosen for lengthy terms and insulated from the heats and ferments of direct popular election. Speaking to this point on June 26, Madison argued that the government should be so constituted "that one of its branches might have an opportunity of acquiring a competent knowledge of the public interests," and should be composed of "enlightened citizens, whose limited number, and firmness might seasonably interpose ag[ain]st impetuous counsels." James Wilson added the corollary—that a body so constituted would be "respectable in the eyes of foreign nations," making it therefore a proper repository of the treaty power.²⁵

This reasoning was cogent enough at the time, but it was rendered suspect to delegates from the larger states by the subtle alteration in the character of the Senate which was produced by the Great Compromise of July 17. A body that had been counted on to bring to foreign affairs a broad view of the interests of the nation as a whole had become, potentially at least, a bastion of states' rights, thanks to the allotment of two seats in the Senate to every state, regardless of size.

The dispute that the Great Compromise had resolved was one that pitted small states against large. More fundamental, however—as subsequent debates gradually made clear—was the conflict in the Convention between regional of states rather than between individual states. What really mattered was the relative voting strength of these blocs as they confronted each other on practical issues—commercial regulation, western settlement, trade treaties, and the like. And their relative voting strength varied, depending on the forum in which it came to be tested. A majority in the Senate might be a minority in the House of Representatives, and vice versa. Where ordinary legislation was concerned, the differing principles of representation in the two houses balanced each other. Compromise was a probable out-

²¹ THE FEDERALIST 504 (J. Cooke ed. 1961).

²² 2 FARRAND, RECORDS at 183 (Report of the Committee of Detail, 6 Aug. 1787, Art. 9, 1).

²³ 2 FARRAND, RECORDS at 185.

²⁴ 2 *Supra* at n.15.

²⁵ 1 *id.* at 422, 426.

come as each of the contending blocs weighed its chance of success in one house against the likelihood of failure in the other.

When, however, the Senate came to be vested with exclusive authority over treaty-making and diplomacy, this built-in balancing mechanism was wiped out so far as foreign policy-making was concerned. Throughout August, with the proposals of the Committee of Detail before the Convention, the debates there (and the maneuverings behind the scenes) were motivated in part by a quest for some counterweight to the Senate—that is, for some arrangement that would reestablish on some basis or other the equivalent of bicameralism in decisions concerning foreign policy.

At stake were interests of various sorts, localized in particular regions, which could be jeopardized by treaties into which the federal government might enter. Misgivings were widespread as delegates contemplated the injury that a treaty might inflict if a majority in the Senate should bargain away rights or privileges vital to some region under represented in that body, or should be laggard in pursuing advantages that a treaty might open up.

One obvious way of restoring to decision-making on foreign policy the kind of balance that bicameralism provided in domestic legislative activity would have been to make the House of Representatives a full-fledged participant in treaty-making. Endeavors in this direction, though ultimately unsuccessful, did become the most conspicuous feature of the debates on the treaty power in August.

Another constitutional device always available for the protection of interests under represented in a particular legislative body is a requirement that specified sorts of measures be passed by a vote larger than a simple majority—typically by two-thirds of those voting. Such a rule, embodied in the Articles of Confederation had figured conspicuously in a crisis over negotiations with Spain in 1766,²⁶ less than a year before the opening of the Federal Convention. A bloc of Eastern and Northern states, vitally concerned with foreign commerce, constituted a majority in the old Congress. Anxious for a trade treaty with Spain, they were ready to give in to the Spanish demand that the United States “forbear” navigation of the lower reaches of the Mississippi River for a period of 25 or 30 years. Such a surrender of claims was anathema to the Southern states with their immense territorial claims in the West. Settlements there could hardly be expected to prosper if settlers could not enjoy free passage to the sea via the great waterway that formed an international boundary in its upper course, but flowed at last through Spanish territory before reaching the Gulf. In the end the five southernmost states—obviously a minority of the 13—were able to bring the negotiations to a halt, thanks to the clause in the Articles of Confederation which provided that Congress “shall never * * * enter into any treaties or alliances * * * unless nine states assent to the same.”²⁷ Subtract 5 from 13 and the remainder is 8.

As a result of this traumatic experience, members of the Federal Convention recognized that if the House of Representatives were not joined with the Senate in treaty-making, an alternative check to protect interests under represented in that body could be furnished by a two-thirds rule. This idea was ultimately incorporated in the Constitution, when, in early September, the Convention accepted a committee proposal to include in the treaty clause the words “But no Treaty shall be made without the consent of two thirds of the Members present.”²⁸

A third possibility, dimly perceived at first, was that regional pressures in the Senate could be balanced by bringing into the process of determining foreign policy an official with a national constituency, that is, the President. There were other, and doubtless more important reasons for giving the President a role in foreign affairs, but it is significant that Madison re-introduced the idea at a critical moment when, on the 23rd of August, he opened the first full-scale debate on the treaty clause by observing “that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”²⁹

A fourth proposal, strongly urged by George Mason of Virginia, would have created a Council of State or Executive Council. On August 8, as part of a continuing criticism of the unrepresentative character of the Senate, George Mason of Virginia inveighed against the Senate’s monopoly of power over foreign relations. That body, he warned on August 15, “could already sell the whole Country by means of Trea-

²⁶ A full account is in Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties*, 55 WASHINGTON L.REV. 1 at 60-68 (1979) (“The Crisis over Negotiations with Spain, 1766”).

²⁷ TANSILL, DOCUMENTS at 32 (Art. 9, 6th paragraph).

²⁸ 2 FARRAND, RECORDS 495 (4 Sept.), 533 (7 Sept.), 550 (8 Sept.).

²⁹ 2 *id.* at 392.

ties," because, as he went on to explain, "the Senate by means of a treaty might alienate territory &c. without legislative sanction."³⁰ The alternative that Mason fought for till the end of the Convention was the creation of a Privy Council or Council of State, separate from and independent of both the executive and the legislature. His final proposal called for "establishing an Executive Council, as Council of State for the President," its six members to be appointed either by Congress as a whole or by the Senate, with two from each of three regional groupings of states: Eastern, Middle, and Southern. In bringing forward this plan on September 7, 10 days prior to adjournment, Mason warned "that in rejecting a Council to the President we were about to try an experiment on which the most despotic Governments had never ventured." Though Franklin, Wilson, Dickinson, and Madison all spoke in favor of a council, Mason's motion was defeated, with eight states against and only three in favor.³¹ In the end Mason refused to sign the finished Constitution, in part because no independent Council was provided.³²

The idea garnered little support in the Convention, even among those who opposed entrusting the power to the Senate alone. Most members apparently believed that the Senate was itself similar enough to a Privy Council to render the latter redundant, and that a better solution to the problem was possible.

These various devices—interchangeable parts in the mechanism of checks and balances—were among those that had already been put to use in the constitutional draft offered by the Committee of Detail and that were being proposed in other connections as that draft was debated and amended during August. They were, as has just been said, interchangeable. They could be attached to one clause and then removed and re-attached to a different clause; the transfer, moreover, could be from a clause dealing with domestic matters to one in the realm of foreign affairs. Merely to state these possibilities is to suggest how useful such a shifting about of checks could be in arranging the compromises that were so necessary a part of the final weeks of work in the Convention.

The first full debate on the treaty clause came at a time when several highly controversial issues had been fought over to the point where compromise seemed the only way out. Several such compromises were in the making when the Convention, pursuing its clause-by-clause examination of the draft, finally reached, on August 23, the provision (half-way through the document) that gave the Senate, without any qualifying words, the unshared "power to make treaties."

A compromise on certain preceding provisions was already being crafted. When the question of treaty-making was taken up on August 23, three of the most divisive regional controversies had reached a crisis stage just 2 days earlier. One involved the provision in the report of the Committee of Detail that forbade the federal government to tax exports from any state. Bracketed with it, in the same clause, was a second ban. Federal power was not to be used to tax or prohibit "the migration or immigration of such persons as the several States shall think proper to admit"—a recognized euphemism for slaves. A third restriction on federal commercial legislation read as follows: "No navigation act shall be passed without the assent of two thirds of the members present in each House."³³

The first of these three controversial provisions (the total ban on export taxes) had been approved on August 21 by a seven-to-four vote—a victory for the exporting states of the South.³⁴ A furious debate erupted, however, over the second half of the same clause, which forbade federal interference of any kind or at any time with the slave trade, international and domestic alike. There were eloquent denunciations of slavery—none more eloquent than that of George Mason of Virginia³⁵—together with cold threats of separation from the Union voiced by delegates from the southernmost states.³⁶

³⁰ 2 *id.* at 297.

³¹ 2 *id.* at 541–42 (Madison's notes, 7 Sept.).

³² 2 *id.* at 638, 649.

³³ 2 *id.* at 183 (art. 7, 4, 6).

³⁴ 2 *id.* at 355, 363–64. The Convention first defeated (with five states in favor and six opposed) an amendment to permit export taxes to be adopted by two-thirds vote. This was moved by Madison as "a lesser evil than a total prohibition." The absolute ban was then approved by a vote of seven states in favor, four opposed. A bloc of five states from Maryland south, plus Connecticut, voted for the ban and against any weakening of it. Four states (Pennsylvania, Delaware, New Jersey, and New Hampshire) were consistently on the opposite side. It was Massachusetts who was willing to accept the complete prohibition though voting for the two-thirds exception. There was an interesting split in the Virginia delegation; Washington and Madison opposed an absolute ban, for which their three colleagues voted.

³⁵ 2 *id.* at 370 (Madison's notes, 22 Aug.).

³⁶ Speeches of John Rutledge (S.C.), Charles Pinckney (S.C.), C.C. Pinckney (S.C.), Abraham Baldwin (Ga.), Hugh Williamson (N.C.). 2 *id.* at 364–65, 371–73.

By Wednesday, August 22, the discussion had become so over-heated that the Convention voted to submit to a compromise committee not only the clauses relating to the slave trade and to navigation acts, but also the prohibition, already approved, of export taxes. By submitting all three together, explained Gouverneur Morris, "These things may form a bargain among the Northern and Southern States."³⁷ When, at the end of the following day, the treaty clause was likewise referred back to committee for possible rewriting, it too became one of the pieces in the complicated chess game of compromise.

On the day following the treaty debate (that is, on Friday, August 24) a multipar-tite compromise was reported by the committee to which had been referred the issues of export taxes, slave importation, and navigation acts. It set a time limit to the period during which the slave trade was to be unrestricted, and it fixed a maximum or, instead of banning completely, any tax on such importation. Its action on the other two issues exemplified a common type of trade-off. The prohibition of export taxes was left in place—a victory for the southern states with their export staples of cotton, rice, and indigo. In return, navigation acts were freed from the requirement of a two-thirds vote for enactment—a victory for the northern states with their commercial and shipping interests, and, of course, a defeat for the southern ones, who feared that transportation costs would rise if foreign competition in the shipping business were curtailed.

The dropping of the two-thirds requirement for passage of navigation acts constituted, in a sense, a release of the requirement for use elsewhere. Now trade treaties could have roughly the same differential impact on regional economic interests as navigation acts or taxes on exports. The requirement of the assent of two-thirds of the legislators present, a requirement now removed from navigation acts, could be—and eventually was—transferred, for similar purposes, to the voting on treaties.

On August 23 Madison opened the principal debate on the treaty clause with the remark, already quoted, that since "the Senate represented the States alone," it would be "proper that the President should be an agent in Treaties."³⁸ Though he alluded again to such participation, no other member responded, pro or con. Instead the days debate took off on in another direction, prompted by a motion of Gouverneur Morris of Pennsylvania that "no Treaty shall be binding on the U.S. which is not ratified by a law"³⁹—a procedure that would give the House of Representatives equal authority with the Senate to approve or reject a treaty.

In the end Morris's motion was rejected, with only his own state of Pennsylvania in favor,⁴⁰ but this was far from settling the issue he raised. Toward the close of the session Edmund Randolph observed "that almost every Speaker had made objections to the [treaty] clause as it stood."⁴¹ Instead of arguing matters further, the Convention voted to refer the treaty provision back to the Committee of Detail which had drafted it. Eventually the clause was passed on, with other unresolved issues, to a new committee, appointed on August 31, and often referred to as the Committee on Postponed Parts.⁴²

On Tuesday, September 4, after a weekend of deliberation, this Committee came up with a second group of recommendations, among which was its proposed substitute for the treaty and appointments clause, its full text reading as follows:

The President by and with the advice and consent of the Senate, shall have power to make treaties: and he shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the Members present.⁴³

This rewritten treaty clause was discussed by the Convention in debates scattered over two days, with other issues obtruding and interrupting the continuity. When it first came up, on Friday, September 7, a motion to include the House of Representatives as an equal partner with the Senate in treaty-making was made by James Wilson of Pennsylvania, but quickly rejected by a vote of ten states against, with only Wilson's own state in favor.⁴⁴ After taking up and approving the part of the

³⁷ 2 *id.* at 374.

³⁸ 2 *id.* at 392.

³⁹ *Id.*

⁴⁰ 2 *id.* at 364, 394.

⁴¹ 2 *id.* at 393.

⁴² 2 *id.* at 473.

⁴³ 2 *id.* at 495.

⁴⁴ 2 *id.* at 538.

clause dealing with appointments, the Convention returned to the treaty clause, this time to its requirement that treaties be approved by a two-thirds vote of the Senators present. On this occasion, two members objected to requiring more than a straight majority, but they did not succeed in stirring up a full-scale debate. In decisions that were reconsidered the next day, the Convention adopted an amendment excepting treaties of peace from the two-thirds requirement, then hastily approved the clause as amended.⁴⁵

Overnight there was a change of heart, and on Saturday, the 8th, the questions previously raised were reopened. The exception for treaties of peace was rescinded, and there followed a succession of proposed amendments to alter the voting requirement in treaty matters. Some delegates would reduce it by requiring the approval of a mere majority of the Senators present. Others, wishing to make the rule more stringent, offered a variety of requirements, including that imposed by the old Articles of Confederation: two-thirds of the entire membership. One after another, the several motions (six in all) were rejected, and the Convention went on to approve, with only three states dissenting, the treaty clause exactly as written by the Committee on Postponed Parts.⁴⁶ Thus, only nine days before completing its work, the Constitutional Convention finally accorded the President a recognized role in the determination of American foreign policy.

This was not quite the end of the revisionary process. On the same day that it approved the treaty clause, the Convention appointed a committee of five "to revise the style of and arrange the articles agreed to by the House."⁴⁷ It was this Committee of Style that came up, on September 12, with a treaty and appointments clause unchanged in substance but worded as it now stands as article 2, section 2, clause 2 of the Constitution of the United States:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur, and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

POWER OF SENATE TO GIVE "ADVICE"

One historic but grave mistake was made by the Senate in its earliest years, when it rebuffed President Washington as he tried to establish a procedure for face-to-face consultation with the Senate on treaties about to be negotiated. The Senate, however, instead of meeting with him in the character of a privy council or council of state, as the framers seem to have intended, insisted that it would have to meet apart from him to discuss the issues, after which it would communicate its views to him. The Senate thus forfeited the role it was intended to have of regularly discussing with the president in person the long-range problems of foreign policy and advising him on the immediate moves to be made, and even drafting (or at least approving) the instructions to be issued to American envoys abroad.

A second grave misunderstanding has resulted from the continued use by the Senate of a formula for treaty approval that was devised to meet a special problem arising in the very first year of the Senate's existence. The situation was this: In 1782 Congress had sent instructions to Benjamin Franklin in Paris to negotiate a treaty with France for the establishment of consulates. The proposed treaty that resulted in 1784 was unacceptable to Congress, which felt that there were deviations from the plan contained in the instructions. Thomas Jefferson, who had succeeded Franklin, was instructed in 1786 and 1787 to renegotiate the treaty, and the old Congress promised—with "candor and good faith"—that if the treaty were made to conform with the original plan, and if a time limit were included, then Congress would "immediately ratify it." The treaty was signed on November 14, 1788, after the new Constitution was ratified but before the new government was organized and

⁴⁵ 2 *id.* at 540-41. Madison proposed the exception for treaties of peace, which was adopted, 8 states to 3. He also moved to authorize "two thirds of the Senate to make treaties of peace, without the concurrence of the President," arguing that the President "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace." This received the support of only three states, however; even Virginia voted with the eight states that opposed.

⁴⁶ 2 *id.* at 547-50.

⁴⁷ 2 *id.* at 547 (Journal, Sept. 8).

put in operation. At the request of the Senate, John Jay, still serving as Secretary for Foreign Affairs, rendered an official opinion on July 25, 1789, certifying that the revised treaty met the conditions laid down by the old Congress and that "the United States ought to ratify it." Four days later, on the 29th of the same month, the Senate accordingly "*Resolved, unanimously, That the Senate do consent to the said convention, and advise the President of the United States to ratify the same.*" Under the circumstances this was an ingenious way of getting around the difficulty of giving advice about the making of a treaty that had already been made. This was accomplished by bracketing the two diverse functions of advising and consenting and applying them in one breath to ratification only, rather than to the treaty-making process in its entirety.

By carelessly perpetuating this ingenious solution to a non-recurring problem, the Senate has virtually abdicated its constitutional responsibility to proffer genuine advice on the content of projected treaties. To this day it employs the following formula when approving a treaty: "*Resolved (two-thirds of the senators present concurring therein), That the Senate advise and consent to the ratification of*" the treaty in question.

Even when the Senate demands changes in a treaty it does not invoke its constitutional right to give "advice" to the President on the making of treaties, but instead attaches reservations to its resolution giving advice and consent to the ratification of the treaty already drawn up. This practice, too, goes back to the early years of Constitutional functioning. Thus the Senate gave its approval to the Jay Treaty of 1794 "on condition that" an article be added, and consented to an 1800 treaty with France "provided" one article be expunged and another substituted.

By adopting the clause that gives the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," the framers of the Constitution were not assigning to the Senate the mere function of rubber-stamping such agreements as the President might decide to make in furtherance of his own conceptions of policy. The past history of the phrase "advice and consent" clearly shows that it connoted the very opposite of this to Americans of the constitution-making generation. For a full century, as we have seen, the phrase in question has been a recognized synonym for parliamentary debate and decision and for the comparable procedures of other high governmental bodies charged with reaching, through deliberation and consultation with executive officials, a consensus on policies and courses of action.

The phrase "advice and consent" contains two distinctively different words, which denote two quite different things—different in nature and different in timing. If language is used rationally, "advice" means counsel offered *before* a decision is reached; "consent" means acceptance of a proposed course of action *after* plans have been worked out in detail and are ready to be carried out. Accordingly, the self-evident meaning of the treaty clause is that the Senate is to reach through discussion a consensus as to the policy to be embodied in a projected treaty; that the President, acting through the nation's diplomatic agents, is to take charge of negotiations designed to realize that policy; and that when an international agreement is negotiated (with concessions necessarily given and received), the Senate is to decide whether its final terms are acceptable.

CONCLUSION

In another place I have summed up the conclusion to which the history of the Constitution seems to me to point respecting the intent of the framers in the matter of determining the foreign policy of the Republic. The title of the article summed up my conclusion: "Advice from the Very Beginning, 'Consent' When the End Is Achieved."

Allow me to spell out the implications of this title by reproducing, with minor stylistic changes, the last two dozen lines of the article in question:

In brief, the phrase "by and with the advice and consent of the Senate" constituted for the framers a requirement that in performing the executive segment of the task of conducting foreign relations, the President is to seek the formal advice of the Senate—a deliberative body responsible to the electorate and not to him—concerning the policy to be pursued and the ends to be sought. In accord with everyday usage, the framers considered "advice" to be something given not only at the outset of an enterprise, but also at subsequent stages so long as the processes of planning, proposing, negotiating, reviewing, and renegotiating go on.

Negotiations with foreign powers are necessarily under the direction of the President, this being the executive component of treaty-making. It is therefore he who must decide (subject to further advice as needed) when and what to yield in the give-and-take of bargaining. Concessions made by both parties are bound to result in

a treaty differing in various respects from the one the President was previously advised to seek. It then becomes the responsibility of the Senate to decide whether to give its consent (by vote of two-thirds of the members present) to the alterations made in the policy it originally advised, or to reject the treaty as involving an unacceptable departure from that policy.

Far from establishing two centers of power at war with one another over the conduct of international relations, the framers of the Constitution believed they were designing a continuously consultative and collaborative relationship between President and Senate, one that would guarantee the nation a unified and consistent policy beyond the water's edge.⁴⁸

Biography of Arthur Bestor

Current Position: Professor of History, Emeritus, University of Washington, (1962-date; retired since 1977).

Degrees: Ph.B., Yale (1930); Ph.D., Yale (1938); M.A., Oxford, (1956), LL.D., Lincoln University (Pennsylvania) (1959); Litt.D., University of Southern Indiana (1988).

Professional Experience Abroad: Harmsworth Professor of American History, Oxford University, England (1956-57); Fulbright Visiting Professor of American Studies, University of Tokyo and Rikkyo University, Japan (1967); Inaugural Lecturer, American Studies Research Centre, Osmania University, Hyderabad, India (1964).

Other University Teaching Posts: Yale (1930-31, 1934-36); Columbia (1936-42); Stanford (1942-46); Wisconsin (1947); Illinois (1947-62); also, summer sessions: Minnesota (1946), Northwestern (1949), Wyoming (1953), Boston College (1959), State University of New York at Stony Brook (1965), Kyoto University, Japan (1967).

Other Positions Held: Editor-in-Chief, Chautauquan Daily, Chautauqua, New York, (1931-33); Editor, Proceedings of the Middle States Association of History and Social Studies Teachers (1938-41); member, Board of Editors, Mississippi Valley Historical Review (1951-54); President, Illinois Historical Society (1954-55); President, Council for Basic Education (1956-57) and member of its Board of Directors (1956-77); President, Pacific Coast Branch, American Historical Association (1975-76).

Awards: Guggenheim Fellowship (1953-54, 1961-62); Newberry Library Fellowship (1946); Beveridge Prize, American Historical Association (1946); Porter Prize, Yale (1938); Member: Phi Beta Kappa, Elizabethan Club (Yale).

Personal: Born 20 September 1908, Chautauqua, New York; married to Dorothy A. Koch; three sons, six grandchildren.

Publications: (partial list): Books in the Field of History: *Backwoods Utopias* (1956; 2d enlarged ed. 1970); *Education and Reform at New Harmony* (1948; reprinted 1973); *Three Presidents and Their Books* (with D.C. Mearns and Jonathan Daniels, 1955); *Problems in American History* (with R.W. Leopold and others, 1952; 4th ed., 1972); *The American Territorial system* (with J.P. Bloom and others, 1973).

Books on Public Educational Issues: *Educational Wastelands* (1953; 2d ed., 1985); *The Restoration of Learning* (1955).

Historical Articles: "State Sovereignty and Slavery," 54 *Journal of the Illinois State Historical Society* 117-180 (Summer 1961); "The American Civil War as a Constitutional Crisis," 69 *American Historical Review* 327-352 (Jan. 1964); "Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined," 5 *Seton Hall Law Review* 527-685 (Spring 1974); "Impeachment" (review of R. Berger), 49 *Washington Law Review* 255-285 (1973); "The American Revolution As World Experiment," *Archiv fur Rechtsund Sozialphilosophie, Beiheft Neue Folge*, No. 10, pp. 31-59 (1977); "Respective Roles of Senate and President in the Making and Abrogation of Treaties," 55 *Washington Law Review* 1-135 (1979); "Advice from the Very Beginning, 'Consent When the End is Achieved,'" 83 *American Journal of International Law* 718-727 (Oct. 1989).

Also Articles and Reviews in: *Journal of the History of Ideas*, *American Scholar*, *Journal of Southern History*, *William and Mary Quarterly*, *Scientific Monthly*, *Daedalus*, *Harvard Educational Review*, *New Republic*, *New York Times Magazine*, and others.

The CHAIRMAN. Thank you very much, Professor Bestor.

⁴⁸ 83 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 718 at 726-27 (1989).

We now turn to Professor D'Amato, and thank you very much. I know something of your background, Cornell and Harvard and Columbia, your years of teaching, and we look forward to hearing from you.

**STATEMENT OF ANTHONY D'AMATO, PROFESSOR OF LAW,
NORTHWESTERN UNIVERSITY**

Mr. D'AMATO. Thank you very much, Mr. Chairman. I think it is true, as Mr. Young said a while ago, that we do not need a peace treaty to establish peace. In fact, the state of peace under international law is a juridical fact, that came into existence in 1945 and it does not require a peace treaty or any other agreement.

What we are talking about, rather, is the giving up of the reserved rights that the United States and the other allies got as a result of the unconditional surrender of Germany in 1945. The question is whether the two-plus-four process or a peace treaty would be the best way to resolve the matter of reserved rights. That is what I would like to talk about.

These reserved rights, just by way of explication, arose by virtue of the unconditional surrender of Germany to the allied powers, and the simultaneous assertion by the allies of supreme power over Germany. The bundle of reserved rights includes the stationing of allied military forces in Germany, the right to store ABC weapons in Germany, the right to proclaim a state of emergency and to take action thereunder, and various powers relating to Berlin and German reunification.

Now, as Mr. Young mentioned on October 19, 1951, Congress passed a joint resolution signed on that date by President Truman, officially terminating the war between the United States and Germany. That resolution had internal effects for the United States, but obviously had no external effects because as I said before, the state of peace was already a juridical fact.

President Truman in his Presidential proclamation of October 24, 1951, noted that the termination of war by joint resolution of Congress was not the equivalent of a peace treaty, and he said, "It has been and continues to be the policy of the United States to bring about the conclusion of a treaty of peace with a government of a united and free Germany."

The joint resolution of Congress of 1951 also did not affect the bundle of reserved rights.

The CHAIRMAN. Excuse me for interrupting. Like Pavlov's dogs, we must respond to these bells. And so there is a rollcall vote going on. I will recess the committee for a few minutes and will be right back.

Mr. D'AMATO. Thank you, Mr. Chairman.

[A brief recess was taken.]

The CHAIRMAN. We return to Professor D'Amato, who was in the middle of his testimony when the committee had to be recessed.

Mr. D'AMATO. Thank you, Mr. Chairman.

President Truman in his proclamation in 1951 made two important points. He said, "It has and continues to be the policy of the United States to bring about the conclusion of a treaty of peace with the government of a united and free Germany." And it would

seem to me that if President Truman's explicit statement is not carried out at this time, a negative inference might arise that perhaps the Senate is abdicating, to some extent, its constitutional role to advise and consent.

Second, President Truman pointed out that the reserved rights that derived from the conquest of Germany and the assumption of supreme authority by the allies are not affected by the termination of the state of war in the joint resolution of Congress.

So, in a way, Mr. Chairman, that is what we are talking about, the bundle of reserved rights. And it is my opinion, and I respectfully disagree with Mr. Young of the Department of State, that you can achieve something extra with a treaty of peace as compared to a series of accords under the two-plus-four process.

Let us consider what would happen to the bundle of reserved rights under the two-plus-four process. It is contemplated that, coincident with the reunification of Germany, there will be a phase-out of the allied security forces and a negotiated termination of the bundle of allied reserved rights. Yet, one might question whether that termination will indeed be final and permanent.

It is theoretically possible under international law that the termination itself could later be renounced. For example, suppose one of the four allied powers, say nation X, at sometime in the future breaks its relation with Germany. Nation X might theoretically claim that the termination of its bundle of reserved rights that occurred at the end of the two-plus-four process was contingent on certain factual, contextual assumptions and representations made at the time, and those assumptions and representations have turned out to be false and fraudulent. Therefore, the termination of the bundle of reserved rights was invalid, and nation X can claim that it now has a right to station troops on German territory, declare a state of emergency, and so forth.

Nation X could proceed to reintroduce military forces on to German territory under the cover of a claim that its previous termination of the bundle of reserved rights was invalid. Now, this of course is a very remote possibility, but as we know, wars have started on lesser misunderstandings than these.

It seems to me that in order to preserve and make sure that there is a termination of the bundle of reserved rights, and make it permanent, this permanency can be achieved by a treaty of peace. Under international law, a treaty of peace has a protected status. It creates new conditions, while itself, it is unconditional.

Contrary to Mr. Young's statement that a treaty of peace is no different from any other international agreement, I would say that it is different. It is a different kind of international agreement. For example, under well settled international law it is not subject to being undone in the future, even if a signatory claims that it signed the treaty under duress or conditions of fraud.

Hence, from the point of view of securing stability and permanence for the new sovereign entity of a reunified Germany, as well as establishing its equality among major powers, this Senate committee's initiative in exploring a treaty of peace is, in my opinion, the proper approach to take.

A treaty of peace also would have strong symbolic force. Mr. Young mentioned several items on the State Department's check-

list, and one of them was past practice, item No. 4 on his list. Well, if we look at past practice, if we look at this in any reasonable way, we will note that after World War I there was the Treaty of Berlin in 1921 between the United States and Germany ending that war. In 1952, we concluded a treaty of peace with Japan; in 1955, a treaty of peace with Austria.

What compelling reason is there why we should not have a treaty of peace with Germany? It seems to me that past practice calls for it. The Constitution calls for it. I think it would be something of an abdication to let this just drift away in a drawn-out series of negotiations in the two-plus-four process.

In fact, I think a peace treaty would be the first international act entered into by a reunified Germany, and I think it would start everything off on exactly the right setting.

[The prepared statement of Professor D'Amato follows:]

PREPARED STATEMENT PROFESSOR D'AMATO

I am the holder of the Judd and Mary Morris Leighton chair in international law at Northwestern University, in Chicago, and a member of the Board of Editors of the American Journal of International Law. I have litigated a number of international cases, and had the honor recently of being the first American attorney to argue a case in the European Court of Human Rights at Strasbourg. I am here to testify on the issue whether a Peace Treaty with Germany would be preferable to the series of accords that is contemplated in the current Two Plus Four process.

I. THE PRESENT SITUATION UNDER INTERNATIONAL LAW

We might begin with the relationship under international law between the United States and Germany at the present time. That legal relationship consists of two aspects: a state of peace, and what might be termed a bundle of "occupation rights." The state of peace is quite different from the bundle of occupation rights, yet they are compatible with each other. Let me explain each of them briefly.

The first is the state of peace. We have been at peace with Germany since the unconditional surrender of May 8, 1945. The state of peace under international law is a juridical fact; it does not require a peace treaty nor any other formal agreement to come into existence. A state of peace has a number of legal effects; for example, it terminates belligerent rights and neutrality rights under international law, and terminates the applicability of many of the Hague and Geneva conventions. While a Treaty of Peace can memorialize and finalize the state of peace between the Allied Powers and Germany, and might be desirable for those reasons, a Peace Treaty is not necessary under international law to establish or ratify the state of peace.

The second aspect of our present relationship under international law with Germany is that, as one of the Allied Powers, the United States has and continues to have various "occupation rights" in Germany. These occupation rights arose by virtue of Germany's unconditional surrender to the Allied Powers in 1945 and the simultaneous assertion by the Allies of supreme power over Germany. The bundle of occupation rights include the stationing of Allied military forces in Germany, the right to store ABC weapons in Germany, the right to proclaim a state of emergency and to take action thereunder, and various reserve powers relating to Berlin and to German reunification.¹

Both the state of peace and the bundle of occupation rights began with Germany's unconditional surrender in 1945 and have continued pretty much intact to the present day. Of course since 1945 a number of events have occurred, but none of them in my opinion has altered the fundamental picture that I have described. Let me briefly mention the two most important of the events that occurred since 1945.

¹ In addition to the occupation rights, and complicating the picture just a little bit, there arose at the same time reparation rights. Rights of reparation don't exist forever; they are extinguished when adequate reparations have been made. At the present time, as far as the four major Allied Powers are concerned, Germany has satisfied its obligation of war reparations, and so the matter is largely closed. In contrast, what I have termed "occupation rights" are still in force and still constitute an issue to be dealt with.

On October 19, 1951, Congress passed a joint resolution, signed on that day by President Truman, officially terminating the war between the United States and Germany. This resolution had internal legal effects in the United States; under international law it made no difference with respect to the juridical fact of a state of peace. However, President Truman in his Presidential Proclamation 2950 of October 24, 1951, noted that the termination of war by joint resolution of Congress was not the equivalent of a Peace Treaty, and he said that "it has been and continues to be the policy of the United States to bring about the conclusion of a treaty of peace with the government of a united and free Germany."

Just as the joint resolution of Congress of 1951 did not affect the juridical fact of the state of peace, it also did not affect the bundle of occupation rights. President Truman made this hint explicit in his Proclamation. He said that the occupation rights "derive from the conquest of Germany and the assumption of supreme authority by the Allies and are not affected by the termination of the state of war."

Another development since 1945 was the series of conventions and agreements, signed between 1952 and 1955, some of them known as the Bonn Agreements, that increased the powers of the Federal Republic of Germany with respect to internal matters. These agreements also explicitly reserved the bundle of occupation rights. In effect what the agreements did was to turn over day-to-day governance of West Germany to the Federal Republic of Germany, while reserving certain occupation rights for use only in emergencies and keeping others (such as the stationing of military forces in Germany) in full effect.

II. THE DESIRABILITY OF A TREATY OF PEACE

This finishes the legal picture of what has happened up to now. The present situation remains that of a state of peace and the reservation of a bundle of occupation rights. The current Two Plus Four talks are contemplated to eventuate in establishing the reunification of a sovereign Germany by a series of accords and not by a Treaty of Peace.

The question is whether the series of accords contemplated as the final product of the Two Plus Four talks would be the equivalent of a Peace Treaty such that no separate Peace Treaty would be necessary. Let us look at this question from the standpoint of the two relationships I mentioned earlier, the state of peace and the bundle of occupation rights. With respect to the state of peace, since it is a juridical fact, it will not be affected either by a separate Peace Treaty or by the Two Plus Four accords. But with respect to the bundle of occupation rights, it is my opinion that you can achieve something extra with a Treaty of Peace as compared to a series of accords under the Two Plus Four process.

Let us consider what will happen to the bundle of occupation rights under the Two Plus Four process. It is contemplated that, coincident with the reunification of Germany, there will be a phaseout of the Allied security forces and a concomitant *renunciation* of the bundle of Allied occupation rights. Yet the question is whether that renunciation will be final and permanent. It is theoretically possible under international law that the renunciation itself could later be renounced. For example, suppose one of the four Allied Powers, say nation X, at some time in the future breaks its relations with Germany. Nation X could theoretically claim that the renunciation of its bundle of occupation rights that occurred at the end of the Two Plus Four process was contingent on certain contextual assumptions and representations made at the time, and those assumptions and representations have turned out to be false and fraudulent. Therefore, the renunciation of the bundle of occupation rights was invalid, and nation X can claim that it now has the right to station troops on German territory, declare a state of emergency, and so forth. It could proceed to reintroduce military forces onto German territory under the cover of a claim that its previous renunciation of the bundle of occupation rights was invalid.

It seems to me that it is in the interest of all parties to the Two Plus Four process to ensure that the renunciation of the bundle of occupation rights will be permanent. In my opinion, this permanency can be achieved by a Treaty of Peace. Under international law, a Treaty of Peace has a protected status; it creates new conditions while it itself is unconditional. It is a constituent act that defines new permanent relationships. It is not subject to being undone in the future even if a signatory claims that it signed the treaty under conditions of fraud or duress.

Hence from the point of view of securing stability and permanence for the new sovereign entity of reunified Germany as well as establishing its equality among the major powers, this Senate Committee's initiative in exploring a Treaty of Peace is in my opinion the proper approach to take. In addition to the preferability under international law of a Treaty of Peace with respect to the termination of the bundle of occupation rights, a Treaty of Peace would also have strong symbolic force. After

all, Peace Treaties in respect of the Second World War have been concluded with Japan (in 1952) and Austria (in 1955). There is no compelling reason why there should not be a peace treaty with Germany. Such a Peace Treaty would be the first international act entered into by a reunified Germany. It would dramatically symbolize the end of an era and the beginning of a new one.

III. THE CONTENT OF A TREATY OF PEACE

The actual content of the Treaty of Peace would probably be pretty much the same as the accords presently contemplated in the Two Plus Four process. Yet in one respect a Peace Treaty would be an especially proper place to include a provision memorializing the victims of the Holocaust. I say this in full awareness of the prevailing view that the generations of Germans born after World War Two should not be saddled with questions that imply their guilt for the policies of Nazi Germany. Yet ignoring the holocaust at the moment of reunification of the German state would be to rewrite history. We would not be treating the present citizens of Germany as responsible adults if we felt that we had to hide the historical fact of the holocaust at the historical moment of the restoration of full sovereignty to Germany.

The Peace Treaty could include, first, the matter of reparations. Germany has had an exemplary record so far in making provisions for monetary reparations to relatives of victims of the holocaust, and in implementing its system of compensation. The Peace Treaty might refer to this record, and ratify it as a solemn obligation of the German State that continues to be honorably discharged.

Second, provision might be made for a Memorial to be erected in Berlin that could contradict the notion of inferiority that the Nazis attributed to the minority groups they slaughtered. Rather than being a memorial to the victims of the holocaust, it might be, perhaps, a library that houses original editions and definitive works of the great European Jews whose contributions to world civilization utterly demolish the Nazi charge of inferiority. Consider that each of the following people I am going to name could have been a victim of the holocaust had he or she been in the wrong place in the late 1930's: Albert Einstein, Robert Oppenheimer, Neils Bohr, Edward Teller, Sigmund Freud, Arthur Koestler, Franz Kafka, Harold Pinter, Eugene Ionesco, Boris Pasternak, Lillian Hellman, Marc Chagall, George Gershwin, Irving Berlin, Leonard Bernstein, Richard Rodgers, Oscar Hammerstein, Jerome Robbins, Jascha Heifitz, Aaron Copeland, Louis Brandeis, Hannah Arendt, and Bernard Baruch.

A memorial dedicated to the contributions to world civilization made by members of groups that Hitler labeled "inferior minorities" would be a tangible and positive contribution to the historical moment of the reunification of Germany and the restoration of German sovereignty.

The CHAIRMAN. Thank you very much, indeed, Professor D'Amato. I appreciate your thoughts and recommendations.

Mr. D'AMATO. You're quite welcome.

The CHAIRMAN. We now come to Mr. Smyser, who has a remarkable record in these fields, and who was once described by Paul Nitze as being "one of the few Americans who has followed these developments with intimate knowledge and understanding over the years."

STATEMENT OF W. RICHARD SMYSER, FORMER POLITICAL COUNSELLOR, U.S. EMBASSY IN BONN

Mr. SMYSER. Thank you very much, Mr. Chairman. What I thought might be most useful for me to do would be not to say anything about the legal background, which these distinguished gentlemen have discussed, but simply to review the diplomacy that has gone on in Germany since 1943, in some very quick phases. And in fact, it can be divided easily into six phases, and we are now in the seventh.

The first phase was what might be termed the war period between 1943 and 1945. Several key meetings, Teheran, Yalta, Potsdam. As you know, the allies did not then agree on a peace agreement for Germany, but they did agree on certain things. Germany

was to be demilitarized, it was to be democratic, and it was to be peace-loving. In fact, they said that they would agree to make a peace settlement for Germany when a German government, for those purposes, is established. They expected that. They established the Council of Foreign Ministers to negotiate that. As you know, they also shifted Poland to the West, and they agreed to divide Germany into occupation zones.

Then came the postwar period from 1945 to 1949. This was the period in which the allies simply assumed supreme authority over Germany. The German state, in effect, as a formal state, ceased to exist. Germany did not surrender in the name of the state. Germany surrendered in the name of the German High Command.

The negotiations between the Council of Foreign Minister members achieved little. As you know, the United States and other Western allies then decided it was time to do something to build up Germany. We did so through bizoning, through the monetary reform. This in turn led to the Berlin blockade which was turned off, but in 1949 we decided to establish the Federal Republic of Germany.

The third phase was a competition, a separate buildup, if you will, on the two sides. On the west there was the Federal Republic, on the east, there was the Soviet creation, the German Democratic Republic. There were many peace proposals. The subject was discussed at all summit meetings, but there was never an agreement. It is correct that the United States Congress in 1951 ended the state of war between the United States and Germany. Incidentally, it should also be added that in 1955, the Soviet Union ended its state of war with Germany.

The United States and others maintained their rights and responsibilities. Even as we ended the occupation statute and made the Federal Republic virtually a sovereign state, we retained our rights and responsibilities with respect to all German matters, with respect to United States forces, with respect to Berlin and with respect to a peace settlement for Germany.

The fourth phase was the Berlin Wall crisis, when Mr. Khrushchev proposed a peace treaty for Germany. If we did not agree to his formula he was going to sign a separate one and create a neutral West Berlin. We did not agree to that. It was not done, but the wall was built and Germany was more divided between East and West.

Then came a phase in which the Germans assumed the diplomatic priority. A series of German governments, of which the best known here is that of Willy Brandt, decided that the United States and the Western allies would do everything possible to defend their rights and the freedom of the West Germans and of the West Berliners, but that the allies could not be counted on to do anything for Germany as a whole or to advance the cause of German unity.

Therefore, these German governments began their own process of negotiations with the East for these purposes. There were periods when the United States did not fully agree with what they were doing, but on the whole we were able to coordinate well.

In that period, German governments signed treaties with the Soviet Union, with Poland and with East Germany. We signed the Quadripartite Agreement. With respect to all agreements, which

we recognized, that the Germans signed, we always stated that they in no way would interfere with allied rights and responsibilities. And incidentally, that was also contained in those treaties or in the accompanying texts.

The last period, which began in 1973 and took us to the present, or I should say the sixth period, was the longest phase, but it was the one in which there was really little development on the peace treaty side. It began in 1973 when the German signed their last agreements, and it ended in 1989 with the collapse of the wall.

During that period, it was again the Germans who worked the German problem. It was not the allies. They kept pushing for unity. They kept pushing for contact. They expanded those at every opportunity, culminating, ultimately of course, in the fall of the wall. There was peace, but there was no settlement.

Now, in 1990, we have a curious kind of paradox, and I think one reason we have this whole discussion is because of this paradox. On the one side, certain principal legal issues remain unsolved. Allied rights and responsibilities still apply, especially in Berlin. Nobody will argue that question. At the same time, we have a German state that is peaceloving, democratic, that has been established for years. It has functioned for 40 years, and now it is to be expanded to cover all the territory of Germany that, under all the legal obligations, it can expect to cover.

This German state is not demilitarized, as we intended in and after World War II, but it is ready to accept limitations on its forces that are acceptable to its neighbors. And, this German state has accepted the border with Poland and is prepared to make a formal engagement on that point when the time comes.

Now, we are in the time when all this needs to be resolved. The timing is very definite. It is supposed to be resolved by November for a conference of the CSCE, and the German Chancellor has announced that he expects unity to occur on December 2. It would be nice to say that all these plans will go as announced. Nobody can be too sure of that. There are a number of questions on a number of issues that still must be settled.

Whatever the timing may be, whatever form the settlement may be, it must resolve the major issues. It must, in some way or another, end allied rights and responsibilities. It is a settlement for Germany, but also, of course, it is a settlement for the Cold War itself.

That is my statement, Mr. Chairman.

[The prepared statement of Mr. Smyser follows:]

PREPARED STATEMENT OF W.R. SMYSER

The four victorious powers of World War II, the United States, the Soviet Union, the United Kingdom, and France, have not yet been able to negotiate a common instrument to end their World War II conflict with Germany. The main reason has been that they have not agreed either on the future of the German state or of that strategically vital part of Europe where the Germans live. None of the four could impose its will on any of the others, and none was prepared to pull back.

Now that a treaty formally ending the war with Germany appears probable in the near future, it is worth reviewing negotiations on Germany and events in Germany, especially in the light of the legal aspects of the German problem. This will help determine what was done, what was not done, and what needs to be done now.

A great deal has happened in Central Europe and in Germany over the forty-five years since the end of World War II. The legal and diplomatic issues have shifted in some ways even as they have remained constant in others.

For review purposes, the diplomacy of Germany can be divided into six periods, beginning during World War II and ending at the present. Each period achieved certain objectives but failed to achieve others.

1. The Wartime Negotiations, 1943-1945

The Allies, like many Germans, knew after the battles of El Alamein and Stalingrad that the war against Germany could and probably would be won, but they also knew that only the most determined common effort could win it. Therefore, even as they were consulting and negotiating about the future settlement of Germany, they did not wish to argue too fiercely with each other. They did not settle or even clearly discuss some of the most contentious and most sensitive matters for fear of disrupting their war effort.

The wartime meetings, especially those at Teheran, Yalta, and Potsdam, did nonetheless reach several important conclusions:

- They agreed, in order to avoid some of the mistakes made during the World War I settlement, that they would not make a deal with either Hitler or a successor German regime but would insist on "unconditional surrender" of Germany.

- They agreed that Germany in future should be democratic, peace-loving and demilitarized.

- They agreed to negotiate a peace treaty with Germany when "a government adequate for the purpose is established," but they did not agree how such a government was to be formed.

- They discussed a number of proposals for dividing Germany on a permanent basis, but the only accord reached on the division of Germany was with respect to the establishment of four (first three) occupation zones and a special area—Greater Berlin—to be jointly occupied but also to be divided into sectors.

- They agreed that the portion of Germany east of the Oder-Neisse line should be taken from Germany and given to Poland in compensation for the land that Josef Stalin was given in eastern Poland. Winston Churchill illustrated this westward shift of Poland with three matches at the Teheran meeting in 1943. Churchill argued during the Potsdam meeting in 1945 that the line should be drawn at the Eastern Neisse River, not the Western, a wish that Stalin was in a position to disregard.

- They agreed at Potsdam that they would establish a Council of Foreign Ministers, consisting of the Foreign Ministers of the Big Four, to negotiate settlements for Germany and the other enemy states.

- They agreed that, pending a negotiated peace settlement, they would assume the supreme authority over Germany and would administer the country under an Allied Control Authority and Berlin under an Allied Kommandatura. They established a number of structures, such as the access regime for Berlin and the Military Liaison Missions, to help organize the occupation.

When the war ended, the German Supreme commander, Admiral Doenitz, surrendered German forces under the authority of the German High Command, not under the authority of the German government, and the state of Germany as a legal entity ceased to function.

Thus, the wartime negotiations left four main questions of a legal and political character open: (1) The formation of a German state that could negotiate peace; (2) the nature of that state; (3) the borders of that state; and (4) the limits on that state's military forces.

2. Diplomatic Efforts, 1945-1949

The Council of Foreign Ministers conducted several years of fruitless and increasingly frustrating negotiations. Much of its effort was wasted on aspects of the occupation (such as reparations) that could not be settled at the occupation authority level. The Council utterly failed to agree on its principal objective: how to select the German government that was to negotiate a peace treaty.

The occupying authorities, separately from the diplomatic process of the Council of Foreign Ministers, established their occupation areas in their own image, with the Soviet Union insisting on the socialization of its occupation area. The Western occupiers, frustrated by the many delays in reaching agreement about the administration of Germany, combined their areas under a coordinated administration.

The tone of Western policy after a year of pointless negotiations was set by U.S. Secretary of State Byrnes, who told an audience in Stuttgart on September 4, 1945, that the United States did not wish to administer Germany indefinitely and wanted instead to see Germans working again. He announced a broad U.S. policy of reviv-

ing Germany. As for the border with Poland, he said the United States favored border revision but the actual border was to be negotiated as part of a final peace settlement.

Moscow responded to the new Western policy, especially the currency reform intended to revitalize the German economy, by the blockade of Berlin in May, 1948. It walked out of the Allied Control Authority and the Allied Kommandatura. The blockade failed but it reinforced the Allied determination to solve as much of the German problem as they could on their own.

In May, 1949, the Berlin Blockade ended. Even before its formal ending, the Western Allies had established the German Federal Republic. But they had not restored German sovereignty. Instead, although they ended direct military occupation, they decreed an "Occupation Statute." Their representatives in Germany were to be High Commissioners, not Ambassadors.

The Basic Law under which the Federal Republic was founded was clearly not intended to establish the permanent German state envisaged under the Potsdam Agreement. It was, instead, a document specifically authorized for "a transitional period" and covering, in its immediate application, only a portion of the former German state. It did, however, contain a provision (in Article 23) that the Basic Law could be "put into force in other parts of Germany on their accession."

The period of the Council of Foreign Ministers reached no solution to any of the legal issues surrounding Germany, and did not even provide the opening for a solution. It merely clarified what the Allies had begun to suspect already in 1945, that they did not agree on what was to happen to Germany.

Nonetheless, the West German Basic Law offered an opening for the formation of a larger German state that could ultimately have the authority to negotiate a peace settlement, even if that authority was not listed in the Basic Law among the powers of the new government.

3. Separate Build-ups, 1949-1958

After the Federal Republic was established, the Russians established the German Democratic Republic, also limiting its sovereignty although they asserted that it had certain rights over East Berlin as its "capital." The German Democratic Republic, on July 6, 1950, issued a joint statement with the Polish government to establish the Oder-Neisse frontier as the common border.

The Western Allies, in turn, gave additional functions to the Federal Republic and limited their own reserved authority over the Federal Republic to such matters as (1) their forces, and (2) Germany and Berlin "as a whole," including an eventual peace settlement and the peaceful unification of Germany. The Western allies also facilitated the procedure for adopting West German legislation in West Berlin but did not abandon their authority over Berlin.

The U.S. Congress, in a Joint Resolution dated October 19, 1951, terminated the state of war between the United States and Germany.

A number of peace proposals for Germany as a whole emanated from both sides, with the Soviets usually proposing a confederation of the two Germanys and the West usually favoring free elections. Germany was always on the agenda of East-West meetings but with little concrete result. Even when some agreements on Germany were reached, as at Geneva in 1955, they were not carried out by Moscow.

There was a particular flurry of diplomatic activity during the early 1950's, when the Allies proposed including West Germany into the European Defense Community and the under conditions that the West did not find trustworthy.

As part of the plan for the European Defense Community, the Federal Republic was given "substantial sovereignty" pending a treaty with "a reunified Germany."

West Germany received an additional boost to its sovereign status when the "Occupation Statute" was abolished and the High Commissioners replaced by Ambassadors. The Federal Republic was granted the "full authority of a sovereign state" but the three Western Allies retained rights and responsibilities relating to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement. The Allies also maintained their occupation authority over Berlin. In 1955, the Soviet Union for its part ended the state of war with Germany but also retained its rights and responsibilities.

Although West Germany was invited to join NATO, strict limits were placed on its armed forces. German forces could not exceed 500,000. West Germany could not have certain classes of weapons and could not have capital ships.

No legal issues were resolved during this period although a number of efforts were made. No negotiations succeeded, but the World War II Allies turned over more and more of the day-by-day administration of Germany to German govern-

ments. This did not alter the legal situation but altered relationships between victor and vanquished.

4. *The Second Berlin Crisis, 1958-1962*

Soviet Premier Nikita Khrushchev initiated another round of diplomatic activity over Germany in 1958, when he issued a 6-month ultimatum for the signature of a German peace treaty and threatened that he would sign a separate pact with the GDR and declare West Berlin a "neutral" city if the West did not sign.

When the West did not sign and when the crisis mood intensified the flight of persons from the GDR, Khrushchev built the Wall. Thereafter, he tried a number of methods to block Allied access and to intimidate the Berliners, but those efforts failed. The Wall crisis ended completely in 1962, after the Cuban missile crisis.

The Wall crisis cemented the physical division of the country. The East German Border Police patrolled the Wall. But that Wall was not recognized as an international boundary even by the Soviets, who maintained their occupation rights and who maintained a separate dialog with the West.

5. *The Germans Step into the Breach, 1963-1972*

After the Wall, West German governments increasingly realized that the Western Allies were prepared to do everything in their power to defend those portions of Germany which had been—or still were—in their areas of occupation, but that those Allies would not attempt to challenge the authority of the Soviets and their surrogates in the Soviet areas of occupation. The occupation lines were acceptable to the Allies, but they were not acceptable to the Germans.

Successive West German governments thus decided to try to alleviate the consequences of the human division of Germany by their own negotiations with the East. With the Allies unable to reach agreement on legal issues, the West German governments proceeded to negotiate on practical issues.

The West Germans set about creating German unity as much as possible in practice, as the Allies could not create German unity in law.

Successive West German governments gradually opened their own direct contacts with Moscow, East Berlin, and Poland, negotiating treaties with each of those countries. Of greatest interest to the Soviets was the treaty between East and West Germany. They regarded this treaty as West German recognition of the German Democratic Republic and of Germany's divided status. Ironically, Soviet actions may have furthered rather than hindered German unity.

Like other post-war steps, the three treaties did not settle the basic legal issues, which they Allies continued to reserve to themselves. Even the German-Soviet treaty did not do so. The treaty with Poland contained a German acceptance of the Oder-Neisse line but again left the final border determination to a contemplated German peace conference. Poland accepted that formula.

The German negotiations coincided with the U.S. detente negotiations with Moscow and were carefully coordinated, especially the Quadripartite Agreement on Berlin. The Germans and their Allies used the Soviet interest in recognition for East Germany to obtain Soviet concessions on Berlin.

The Western Allies also negotiated agreements with the GDR, extending a measure of recognition while still holding their reserved powers. The United States was the last to send an Ambassador to East Germany. To underline the separate status of Berlin and its non-recognition of GDR sovereignty over East Berlin, the United States called its Embassy in East Berlin the Embassy "to the GDR," not "in the GDR."

By its negotiations and agreements with the Eastern governments, the Federal Republic was able to improve the situation in Germany. But it never sought and was never given authority to deal with the legal issues arising out of World War II, and it steadfastly insisted that its purpose was not to negotiate a peace treaty. The United States supported this interpretation.

6. *A Status Quo without Status, 1973-1989*

After 1973, the German question appeared less urgent to all the parties who were it, a position to take action. The Western allies and the Soviet Union were prepared to let Germany remain divided rather than to risk an unfavorable change in the European balance. The West Germans believed that they had achieved their immediate purpose of alleviating some of the most inhumane results of the Wall.

The people who most wanted change were those in East Germany, but they were not it, a position to make their views known or effective until the opening to the West in Hungary and Czechoslovakia permitted them, to begin escaping again in large numbers.

Although this period was longer than any of its predecessors, it also produced no change in the legal or official situation. But the political situation in East Germany deteriorated to the point where the regime could no longer expect any loyalty from its people. This, in turn, led to the present opportunity for negotiations.

WHERE WE ARE

As this survey has shown, what has been accomplished has not been in the legal solution to the German problem but in the political structures and attitudes that may make a legal solution possible and mutually acceptable.

Soviet and Western Allied actions were not aimed at a settlement of the German issue by negotiations. They were steps taken during a Cold War confrontation in order to reinforce positions in Europe. Nonetheless, certain changes have taken place that may have helped pave the way for a settlement now.

The situation now stands as follows with respect to the objectives that the World War II allies set for themselves:

—Although no all-German state that is democratic, peace-loving, and able to negotiate a peace treaty has yet been established, the Federal Republic offers the foundation for such a state. Its Basic Law, under Article 23, also offers the means to extend such a state across the entire present territory of Germany.

—Although the German government formally asserts that it will not give final approval to a new German border with Poland until a peace treaty, the political readiness to accept that border is clearly present and it will be accepted.

—Although the situation in Europe will not now permit establishing a completely demilitarized German state, an accord which sets limits on German forces can be negotiated if those limits are matched by limits on the forces opposite Germany.

PEACE FOR GERMANY: A STRUCTURE FOR EUROPE

The peace treaty with Germany cannot be negotiated or ratified in isolation only as a treaty for Germany. It is the legal document that formally ends World War II but it is also a political step that ends the Cold War which was fought about the German peace treaty. It and its accompanying documents must reconcile not only the World War II enemies but also the Cold War enemies.

There can be no peace for Europe without peace in Germany, and no peace for Germany without peace in Europe. Thus, the German peace treaty must establish not only a settlement for Germany but also a reconciliation between East and West in Europe.

The legal issues relating to the future status of Germany are the same as they were in 1945. As the analysis has shown, the passage of 45 years, and the many steps that have been taken during that time, now make solution of those legal issues possible.

A peace treaty for Germany will, however, be only one of a compendium of accords, formal and informal, bilateral and multilateral, that are now being negotiated and that have in some instances already been reached. Those accords will establish the new European balance with a united Germany at the center and almost certainly with a role for the United States. They will take account of the changes that have taken place since 1945, whether those changes are in the legal or in the political realm.

Two of the accords that are to be negotiated are likely to be formal treaties and to be formally presented to the U.S. Senate for its advice and consent. One should be the peace treaty with a united Germany. The other would be a treaty which limits the number of conventional forces in Europe. There may also be a treaty limiting nuclear forces in Europe but that remains uncertain. Even less certain would be any formal amendment of the Helsinki Accords, although there is a great deal of speculation that the role of the Helsinki mechanism can and should be expanded as part of the German and European peace.

We cannot now tell precisely how or when those treaties will be negotiated, nor how all the related documents and accords will fit together. The Two-plus-Four process is going on. So are many other informal and formal negotiations and consultations.

Theoretically, the diplomatic process is to be finished by November in time for a summit of the nations that had signed the Helsinki Accords. But there are some very complicated legal, political, and economic issues still to be solved. Some of those complexities, like the unification of Germany, armaments limits for Germany, or ending the occupation status of Berlin, are part of the German peace treaty. Others, like the precise arrangements for aid to Moscow, are only indirectly related to it but are nonetheless essential components of a total settlement.

All these issues are negotiable, and in some cases the outlines of a potential agreement are in place or understood, but they need great care to combine legal, political, and stability requirements.

Although the U.S. Senate may formally be presented with only two treaties, it may also wish to inform itself about the related political, economic, and military agreements and understandings that make the treaties possible. They should together constitute the legal and political structure that assures peace in Europe and reflects the sacrifices and efforts that have been made by the United States.

WILLIAM RICHARD SMYSER—CURRICULUM VITAE

CAREER SUMMARY

1986 to Present: Consultant and author on international affairs, concentrating on political, strategic, and economic issues for analysis and planning purposes:

- Special emphasis on Germany and Western Europe, as with the European Community's 1992 internal market plans.

- Recently published a book on German-American relations and now writing one about the German question.

1981-1986: Deputy High Commissioner for Refugees, United Nations:

- Administered and negotiated world-wide programs for an organization of 1,500 employees (of over 60 nationalities) with budget of \$500 million. Traveled to more than 50 countries in Africa, Asia, Europe, and the Americas to deal with refugee crises and to negotiate with governments and agencies;

- Raised funds for refugee programs from Western governments, Japan, and from non-government organizations. Raised tens of millions of dollars in helping to organize an African refugee conference.

1980-1981: Deputy Director and then Director of the Bureau of Refugee Programs, U.S. Department of State:

- Dealt with American and international agencies and foreign governments on refugee aid and resettlement.

- Presented budgets and programs to U.S. Congress and to U.S. Office of Management and Budget.

1979-1980: Senior Fellow, Center for Strategic and International Studies (then linked to Georgetown University):

- Wrote books and articles on German-American relations and global strategic and economic matters.

1975-1979: Counselor for Political Affairs, U.S. Embassy, Bonn:

- Managed political relations with Federal Republic. Consulted and negotiated on strategic cooperation, East-West ties, arms control, Berlin, and the European Community.

1973-1975: Senior Staff Member, U.S. National Security Council:

- Arranged visit by President Ford to Japan and Vladivostok. First visit to Japan by U.S. President.

1972-1973: Fellow, Woodrow Wilson International Center for Scholars. Studied, wrote, and lectured on U.S. foreign policy and on Western Europe.

1971-1972: Fellow, Center for International Affairs, Harvard University. Wrote on European Community political and economic affairs and on European integration.

1970-1971: Staff Member, U.S. National Security Council. Participated in secret Beijing visit with Henry Kissinger.

1969-1970: Member, U.S. Delegation, Paris Peace Talks on Indochina.

1966-1970: Assignments in U.S. State Department in East Asia Bureau and in Bureau for Intelligence and Research. Attended George Washington University for Ph.D. studies.

1964-1966: U.S. Embassy, Saigon. Reported on ties between Asian Communist governments, especially China and Vietnam.

1960-1964: U.S. Mission, Berlin:

- Special Assistant to General Lucius Clay when he was President Kennedy's Personal Representative;

- Also analyzed and reported on the German Democratic Republic and was involved in handling the Berlin problem.

1959-1960: Fellow, Littauer Center, Harvard University, for German Studies Program:

- Wrote article on Berlin Blockade and completed M.A. Thesis.

1957-1959: U.S. Consulate General, Algiers.

1955-1957: U.S. Department of State. Attended Georgetown University for M.A. studies.

1952-1954: U.S. Army. Assignment to Munich, Germany.

PUBLICATIONS

Books:

- Restive Partners (Westview, 1989);
- Refugees: Extended Exile (Praeger, 1987);
- Deutsch-Amerikanische Beziehungen (Europa-Union Verlag, 1981);
- The Independent Vietnamese (Ohio Univ. Press, 1981).
- German-American Relations (Sage, 1980);

Other:

Articles in Foreign Affairs, The Washington Quarterly, Europa-Archiv, and in Op-Ed columns of Washington Post, Los Angeles Times, Newsday, etc. Papers presented at Aspen Institute, Bergedorfer Kreis, Berlin Politischer Club, Center for Strategic and International Studies, Council on Foreign Relations, Deutsche Gesellschaft fuer Auswaertige Politik, Stiftung Wissenschaft und Politik, Woodrow Wilson Center, etc., World Affairs Councils and German political foundations.

Studies:

Ph.D., George Washington University, 1977. International relations, political theory, government, Europe and Asia. Dissertation on international Communist relations.

M.P.A., Harvard University, 1960. German history and politics; international administration.

M.A., Georgetown University. Government, 1960. Thesis on the formation of the Iraq Petroleum Company.

B.S., Economics, Wharton School, University of Pennsylvania, 1952. International economics and politics.

Languages:

Fluent German, French, and Spanish: Some Italian.

Personal Data:

Born November 1931. U.S. citizen. Married, one son. Member, International Institute for Strategic Studies, Washington Institute on Foreign Affairs, American Council on Germany.

The CHAIRMAN. Thank you very much, indeed, Mr. Smyser.

Professor Bestor, I have a question here for you, but I would like to welcome you back before our committee. I should have mentioned it before. I think it was 14 years ago that you appeared before our committee and testified on the Senate's role with regard to treaties. Thank you. I hope that in 14 years from now, maybe you will be doing the same thing.

Mr. BESTOR. I am older but not necessarily wiser.

The CHAIRMAN. Having heard Mr. Smyser's presentation of the diplomatic history, and Professor D'Amato's assessment of some of the lingering international legal questions which remain, is it conceivable to you that the Founding Fathers could not have intended these items to be encompassed by the treaty clause?

Mr. BESTOR. I think that they recognized, as everyone must, that there are details to any settlement which cannot very well be included in the treaty. Indeed, they recognized that principle in the Constitution itself, which is notable for its conciseness, and yet its coverage. But I think they felt that any international agreement that was to be enforceable, both domestically and in international law, should be firmly founded on the advice and consent of the body in the government which was charged with that responsibility.

I think they would have found it perfectly possible for a general treaty of peace to delegate to later discussion by responsible ministers of the powers involved a reasonable way of working out de-

tails. But I do not think they would have wanted to rest a permanent peace upon the kind of shifting ground that is represented by executive agreements or other such instruments.

The CHAIRMAN. Professor D'Amato, here is a question I would like to ask of you: Is there any legal significance to whether a war is terminated by congressional resolution, as distinguished from a treaty, or is it the same?

Mr. D'AMATO. Well, I think the war—a state of peace was entered into in 1945. The termination for internal purposes was 1951. I do not think that a treaty of peace is necessary to terminate a war, but it is necessary in this case to terminate the reserved rights, in my judgment.

The CHAIRMAN. Assume that of the four allied powers from World War II, two of them wanted to sign a treaty with the reunified Germany and two did not? Could the two who wished to go ahead and sign such a treaty?

Mr. D'AMATO. Yes, they could. The United States did not sign the Treaty of Versailles, and then we signed a separate peace treaty with Germany in 1921. I think there would be enormous pressure on the other two allies, though, to join the peace treaty.

The CHAIRMAN. Right. What would be the international legal implications of doing that, of having two negotiate and two not?

Mr. D'AMATO. Well, the treaty of peace, in my view, is the most permanent and the least shakable, at least overturnable way you can resolve this matter. For the other two parties that were not involved, their relation with Germany might be a little shakier. In fact, I think that in all likelihood, if a treaty of peace was entered into with even one of the four allied powers, probably the Government of Germany itself would insist of tying it up with everyone else. It would be very silly for them not to.

The CHAIRMAN. Thank you. And Mr. Smyser, let me ask you as a student of our diplomatic history, about what the participants in the early days would have wished. In other words, if we were able to ask Mr. Dulles or Mr. Acheson or any of President Truman's colleagues and advisors how they would have perceived the last chapter, looking ahead, would they have perceived it as ending with a treaty, or would they have seen it ending in a series of executive agreements in your view?

Mr. SMYSER. I do not think there can be any question about that. They would have perceived it as ending with a treaty. They said so all the time. They spoke continually of their anticipation of a peace treaty with a German state.

The CHAIRMAN. I thank you gentlemen, very much. The record will stay open for any further questions from my colleagues, and any addenda that you would care to add to your testimony, which will be inserted in the record in full as if read, and I thank you for being with us. The hearing is recessed.

[Whereupon, at 4:30 p.m., the committee adjourned, subject to the call of the Chair.]

